SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 306

LOUIS A. JOHNSON, SECRETARY OF DEFENSE OF THE UNITED STATES, ET AL., PETITIONERS

vs.

LOTHAR EISENTRAGER, ALIAS LUDWIG EHRHARDT, ON HIS OWN BEHALF AND AS NEXT FRIEND OF FRANZ SIEBERT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. A., District of Columbia Circuit	1	1
Caption	1	1
Joint appendix to brief	1	1
Petition for writ of habeas corpus	2	2
Order to show cause, filed May 17, 1948	9	7
Amendment of petition for writ of habeas corpus, filed June 10, 1948	10	7
Return to rule to show cause why writ of habeas corpus should not issue, filed June 10, 1948	12	9
Petitioner's answer to return to rule to show cause, filed June 21, 1948	15	11
Motion for amendment of petition for writ of habeas corpus, filed July 15, 1948	16	12
Order allowing amendment of petition for writ of habeas corpus, filed August 4, 1948	17	12
Order to show cause, dated August 23, 1948	18	13
Motion for leave to amend return to rule to show cause, filed August 31, 1948	18	14
Order granting motion for leave to amend return to rule to show cause, filed August 31, 1948	19	14
Return to rule to show cause why writ of habeas corpus should not issue, filed September 20, 1948	19	15

	Original	Print
Joint appendix to briefs—Continued		
Motion for amendment of petition for writ of habeas corpus, filed September 30, 1948	20	15
Order allowing amendment of petition for writ of habeas corpus, filed September 30, 1948	20	15
Order dismissing petition for writ of habeas corpus	21	16
Opinion of the Court, Tamm, J	21	16
Notice of appeal	22	17
Joint appendix of exhibits	24	18
Exhibit "A"—Act of military surrender	26	18
Exhibit "B"—Declaration regarding defeat of Germany	28	19
Exhibit "C"—Charge and bill of particulars against Lothar Eisentraeger, et al	36	25
Exhibit "F"—Regulations governing the trial of war criminals	48	34
Exhibit "G"—Findings and sentences	57	40
Exhibit "H"—Extracts from FM 27-10 "Rules of Land Warfare"	59	42
Exhibit "I"—Final action on sentences of defendants	60	42
Exhibit 1—Designation of prison for war criminals	62	44
Exhibit 2—Message of 27 December 1945 to various Commanders in Chief	61	45
Exhibit 3—Message of 19 April 1946 to War Department from COMGENCHINA, and Correction	66	47
Exhibit 4—Message of 6 July 1946 to Wedemeyer from Joint Chiefs of Staff	68	48
Exhibit 4A—Message of November 26, 1946, Chinese Minister of Foreign Affairs to American Ambassador to China	71	51
Exhibit 5—Message of 9 July 1946, Joint Chiefs of Staff to Commanding Officer, Nanking Headquarters Command	69	49
Exhibit 6—Message of 3 December 1946, WDGPO to CG Army Advisory Group, Nanking, China	70	50
Opinion, Prettyman, J	73	53
Judgment	83	63
Petition for rehearing	84	64
Order denying petition for rehearing	86	66
Designation of record	86	66
Clerk's certificate	87	67
Stipulation as to printed record	88	68
Order allowing certiorari	89	69

1 In the United States Court of Appeals for the District of Columbia Circuit

No. 10053

LOTHAR EISENTRAGER, ALIAS LUDWIG EHRHARDT, ON HIS OWN BEHALF AND AS NEXT FRIEND OF FRANZ SIEBERT, ERICH HEISE, OSWALD ULBRICHT, HANS NIEMAN, INGWARD RUDLOFF, BODO HABENICHT, HANS DETHLEFFS, HEINZ PEERSCHKE, HANS MOSBERG, JOHANNES RATHJE, SIEGFRIED FUELLKRUG, WALTHER HEISSIG, JESCO VON PUTTKAMER, ALFRED ROMAIN, WALTER RICHTER, HERMAN JAEGER, FELIX ALTENBURG, HERBERT MUELLER, AUGUST STOCK, MARIA MULLER, APPELLANTS

v.

JAMES A. FORRESTAL, SECRETARY OF DEFENSE OF THE UNITED STATES; KENNETH C. ROYALL, SECRETARY OF THE ARMY OF THE UNITED STATES; OMAR BRADLEY, CHIEF OF STAFF OF THE UNITED STATES ARMY, MEMBER OF JOINT CHIEFS OF STAFF; WILLIAM D. LEAHY, MEMBER OF JOINT CHIEFS OF STAFF (CHIEF OF STAFF TO THE COMMANDER IN CHIEF OF THE UNITED STATES); LOUIS E. DENFELD, MEMBER OF JOINT CHIEFS OF STAFF (CHIEF OF NAVAL OPERATIONS); HOYT S. VANDENBERG, MEMBER OF JOINT CHIEFS OF STAFF (COMMANDING GENERAL OF THE UNITED STATES ARMY AIR FORCES), APPELLEES

Appeal from an Order of the District Court of the United States for the District of Columbia

Joint Appendix

Filed Dec. 20, 1948

2 In the United States District Court, District of Columbia

LOTHAR EISENTRAGER, ALIAS LUDWIG EHRHARDT, ON HIS OWN BEHALF AND AS NEXT FRIEND OF FRANZ SIEBERT, ERICH HEISE, OSWALD ULBRICHT, HANS NIEMAN, INGWARD RUDLOFF, BODO HABENICHT, HANS DETHLEFFS, HEINZ PEERSCHKE, HANS MOSBERG, JOHANNES RATHJE, SIEGFRIED FUELLKRUG, WALTHER HEISSIG, JESCO VON PUTTKAMER, ALFRED ROMAIN, WALTER RICHTER, HERMAN JAEGER, FELIX ALTENBURG, HERBERT MUELLER, AUGUST STOCK, MARIA MULLER, PETITIONER

v.

JAMES A. FORRESTAL, SECRETARY OF DEFENSE OF THE UNITED STATES; KENNETH C. ROYALL, SECRETARY OF THE ARMY OF THE UNITED STATES; OMAR BRADLEY, CHIEF OF STAFF OF THE UNITED STATES ARMY, RESPONDENTS

Petition for Writ of Habeas Corpus

Filed April 26, 1948

Comes now your petitioner and to this Honorable Court respectfully represents:

I. That Petitioner, Ludwig Ehrhardt, brings this matter in his own behalf and as next friend of Franz Siebert, Erich Heise, Oswald Ulbricht, Hans Nieman, Ingward Rudloff, Bodo Habenicht, Hans Dethleffs, Heinz Peerschke, Hans Mosberg, Johannes Rathje, Siegfried Euellkrug, Walther Heissig, Jesco von Puttkamer, Alfred Romain, Walter Richter, Hermann Jaeger, Felix Altenburg, Herbert Mueller, August Stock, and Maria Muller., The petitioner, together with the afore-mentioned other persons, hereinafter referred to as the prisoners, are confined in the custody of the Commandant of Landsberg prison, which is located in the American occupation zone of Germany.

3 II. That the respondent, James A. Forrestal, is the Secretary of Defense of the United States; the respondent, Kenneth C. Royall, is the Secretary of the Army of the United States; and the respondent, General Omar Bradley, is the Chief of Staff of the United States Army; and as such the said respondents have jurisdiction and supervision over the official acts of the said Commandant of Landsberg Prison. The said Commandant of Landsberg Prison is not made a respondent hereto because he is not situated within and cannot be served with process within the territorial limits of the United States. He derives his powers and authority from and is subject to the direction of the respondents, all of whom are located within the District of Columbia.

III. That the prisoners were, prior to May 8, 1945, German nationals in the service of the German armed forces in Shanghai, Canton, and Peiping, in China.

IV. That on May 8, 1945, a so-called "Act of Military Surrender" was executed by "Friedeburg", "Keitel", and "Stumpff", purporting to act on behalf of the German High Command, setting forth an "unconditional surrender" to the Supreme Commander, Allied Expeditionary Force and to the Supreme High Command of the Red Army of "all forces on land, at sea, and in the air" who were at that date "under German control". Paragraph four of the said Act provided: "This act of military surrender is without prejudice to, and will be superseded by any general instrument of surrender imposed by, or on behalf of the United Nations and applicable to Germany and the German armed forces as a whole." (The "Act of Military Surrender" is marked "Exhibit A", attached hereto and made a part hereof.)

On June 5, 1945, there was executed by Dwight D. Eisenhower, G. Zhukov, B. L. Montgomery, and S. de Lattre-Tassigny, at

Berlin, the so-called "Berlin Declaration", which recited that the German armed forces had been defeated and had surrendered unconditionally, and had become subject to such requirements as were therein imposed; that there was "no central Government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the Victorious Powers," and which then set forth the terms of the Allied Military Occupation of Germany. (The "Berlin Declaration" is marked "Exhibit B", attached hereto and made a part hereof.) Neither the German High Command nor any other German agency was signatory to nor participant in the "Berlin Declaration", and it was entirely a unilateral pronouncement.

4

After May 8, 1945, and after June 5, 1945, and until and including August 15, 1945, the Japanese Empire continued to wage war against the United States.

V. That the cities of Shanghai, Canton, and Peiping were, prior to May 8, 1945, and thereafter until August 15, 1945, under the control and domination of the military forces of the Japanese Empire; that during the period of such control and domination, and until August 15, 1945, the prisoners were resident in the said cities and were subject to the said control and domination of the military forces of the Japanese Empire.

VI. That subsequent to August 15, 1945, twenty-seven persons, including the prisoners and, in addition, Ernest Woerman, Wilhelm Stoller, Elgar von Randow, Herbert Gleitsch, Johannes Otto, and Wolf Schenke (which latter six persons were later acquitted) were taken into custody and held by the Armed Forces of the United States. Twenty-three of the aforesaid persons were served on August 1, 1946, with a charge and bill of particulars, and the remaining four of the said persons were served, on August 28, 1946, with a similar charge and bill of particulars, all under the authority of the Commanding General, Nanking Headquarters Command, a division of United States Forces, China Theater. The charge and bill of particulars (a copy of which marked "Exhibit C" is hereto attached and made a part hereof) alleged violation of the laws of war, to wit: that the accused violated the unconditional German surrender by engaging in, permitting, or ordering military activity against the United States between the German surrender of May 8, 1945, and the cessation of Japanese hostilities on August 15, 1945.

5

VII. That by paragraph 1, Special Orders No. 120, Headquarters Nanking Headquarters Command dated July 31, 1946 (marked "Exhibit D" hereto attached and made a part hereof), a Military Commission was purported to be constituted for the trial of persons, units, and organizations accused as war criminals

within the jurisdiction of the said Nanking Headquarters Command, and upon the completion of such trial or trials to transmit the record thereof, including any judgment or sentence, for action by the appointing authority, viz: the Commanding General of the Nanking Headquarters Command. By letters of transmittal dated July 31, 1946, and August 1, 15, and 28, 1946, and by first indorsement on each hereof, the aforesaid charges against the 27 accused were referred to be tried in a common trial before the Military Commission (the said documents being marked "Exhibit E", attached hereto and made a part hereof). The aforesaid orders purported to be based on the authority of Letter, Headquarters, United States Forces, China Theater, 21 January 1946, AG000.5 (21 Jan 46) JA, Subject: Regulations Governing the Trial of War Criminals (marked "Exhibit F", attached hereto and made a part hereof).

VIII. That the common trial of the 27 accused began with the arraignment of 23 defendants before the aforesaid Military Commission sitting in courtroom, the Ward Road Jail, Shanghai, China, on August 26, 1946, and the arraignment of the 4 additional accused before the same Military Commission sitting in the same place on September 26, 1946. All of the accused pleaded "not guilty".

IX. That on September 16 and 17, 1946, the Military Commission convened and motions were made on behalf of all of the accused to dismiss the charges on the following grounds (inter alia):

1. That at the time of the German surrender, the accused were not under the control of the German High Command or the German Government, but were under the control of the armed forces of the Japanese Empire.

2. That the unconditional surrender of Germany did not bind the Japanese Empire so as to affect its right to compel cooperation of inhabitants of territory occupied by it,

3. That the acts charged did not constitute war crimes, there being no allegation that the accused had official knowledge or instructions concerning the German surrender;

4. That in the absence of hostilities, martial law, or American Military occupation of China, and in view of treaties between the United States and China dated February 4, 1943, and May 4, 1943, and between Germany and China dated May 18, 1921, the Military Commission was without jurisdiction; all of which motions were denied.

X. That the hearing of the prosecution's case commenced on October 3, 1946, and ended on November 1, 1946, after which all accused moved for findings of not guilty. The motions were allowed with respect to the following six persons:

Ernst Woermann, German Ambassador to Japanese-occupied China,

Wilhelm Stoller, Chief of the Shanghai Office of the German Embassy,

Elgar von Randow, Counselor of the Shanghai Office of the German Embassy,

Herbert Gleitsch, Secretary of the German Consulate at Canton,

Johannes Otto, head of the Nazi Party in South China and leader of the German Community in South China,

Wolf Schenke, member, agent and employee of the Bureau Ehrhardt.

The motions were denied with respect to the remaining twenty-one accused, who are the prisoners for whom this petition is brought.

7 XI. That the hearing of the defense case commenced on November 13, 1946, and ended on January 14, 1947. On January 17, 1947, the Military Commission rendered its verdict, finding all remaining accused guilty, and sentencing them to confinement at hard labor, as follows:

Ludwig Ehrhardt	Life.
Ingward Rudloff	10 years.
Bodo Habenicht	10 years.
Hans Dethleffs	10 years.
Heinz Peerschke	5 years.
Hans Mosberg	20 years.
Johannes Rathje	15 years.
Walter Richter	10 years.
Hermann Jaeger	10 years.
Jesco von Puttkamer	30 years.
Alfred Romain	30 years.
Franz Siebert	5 years.
Erich Heise	20 years.
Oswald Ulbricht	5 years.
Hans Niemann	5 years.
Felix Altenburg	8 years.
Herbert Mueller	10 years.
Siegfried Fuellkrug	20 years.
Walther Heissig	20 years.
August Stock	5 years.
Maria Muller	5 years.

(The Commission's verdict marked "Exhibit G" is attached hereto and made a part hereof.)

XII. That at no time during any of the aforesaid proceedings was the protecting power of Germany notified thereof by the United States, although such notice is required by Article 60 of the Geneva Convention of July 27, 1929, relative to the treatment of prisoners of war, and of Paragraph 133 of the Rules of Land Warfare (FM 27-10), United States War Department, copy of which is marked "Exhibit H" attached hereto and made a part hereof.

8 XIII. That on May 10, 1947, Major General John P. Lucas, Chief of the United States Army Advisory Group, China, which was the successor, pursuant to War Department radio WCL34266, dated December 5, 1946, of the Nanking Headquarters Command, acting as Reviewing Authority of the Military Commission, issued his action. The action approved all of the sentences of the Military Commission, but made the following remissions:

Alfred Romain—remitted from 30 years to 20 years.
August Stock—remitted from 5 years to 2 years.
Maria Muller—remitted from 5 years to 2 years.

With such modifications, the sentences were ordered executed, Landsberg Prison, Landsberg, Germany, being designated as the place of confinement. (The action of the Reviewing Authority is marked "Exhibit I", attached hereto and made a part hereof.)

XIV. That pursuant to such action, the prisoners were confined and are now confined in Landsberg Prison, Germany, in the custody of the United States Army.

XV. That the detention of the prisoners as convicted war criminals is illegal and in violation of Articles I and III of the Constitution of the United States and of the Fifth Amendment thereto, and of other provisions of said Constitution and laws of the United States and of certain provisions of the Geneva Convention of July 27, 1929, relative to the treatment of prisoners of war, in that:

(a) There being no charge of an offense against the laws of war by the prisoners, the Military Commission was without jurisdiction.

(b) In the absence of hostilities, marital law, or American military occupation of China, and in view of treaties between the United States and China dated February 4, 1943, and May 4, 1943, and between Germany and China, dated May 18, 1921, the Military Commission was without jurisdiction.

9 (c) The directive of Headquarters, United States Forces, China Theater, (Exhibit F), setting forth the rules of procedure and evidence for the Military Commission, and the action of the Commission thereunder, denied the prisoners the right guaranteed by Article 63 of the Geneva Convention of July 27, 1929, relative to the treatment of prisoners of war, to a trial, "by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power," and the Military Commission was, therefore, without jurisdiction.

(d) The United States not having given notice of the trial to the protecting power of Germany as made mandatory by the Geneva Convention of July 27, 1929, relative to the treatment of prisoners of war, the Military Commission had no jurisdiction.

XVI. That the prisoners are and continue to be unlawfully confined as convicted war criminals as aforesaid, by the respondents, their agents and subordinates.

Wherefore, Petitioner prays that a Writ of Habeas Corpus be issued by this Court, directed to the respondents, commanding them to produce his body and the bodies of the other prisoners before your court or some member thereof at a time and place therein to be specified, then and there to receive and do what your Honorable Court shall order concerning their confinement as convicted war criminals, and that the petitioner and the other prisoners be discharged from the offenses and confinement aforesaid.

LOTHAR EISENTRAGER, alias LUDWIG EHRHARDT.

In United States District Court

Order to Show Cause

Filed May 17, 1948

Upon the complaint filed herein in the office of the clerk of this Court and the annexed affidavit of Lothar Eisentrager, alias Ludwig Ehrhardt, verified on the 12th day of April 1948,

Let the defendants, and each of them, show cause before this Court, at a stated term thereof, to be held for the hearing of motions, in the U. S. District Court, in the City of Washington, D. C., on the 10th day of June 1948, at 10:00 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, why an order should not be made and entered in the above-entitled action which shall direct that a Writ of Habeas Corpus be issued as requested by the plaintiffs.

Let service of this rule nisi, together with a copy of the complaint and the affidavit hereto annexed, on such of the defendants as may be found within this district on or before the 1st day of June 1948, be deemed sufficient.

(S) T. ALAN GOLDSBOROUGH, *Justice.*

In United States District Court

Amendment of Petition for Writ of Habeas Corpus

Filed June 10, 1948

Comes now the petitioner, through his attorneys, and respectfully shows to this Honorable Court that the petition herein is amended as follows:

1. Paragraph III of the original petition is deleted and the following paragraph is substituted therefor:

III. That the prisoners were, prior to May 8, 1945, German nationals employed by various civilian agencies of the German Government in Shanghai, Canton, and Peiping, in China, as follows:

German Embassy and Consular Service.
Franz Siebert—Consul General at Canton.
Felix Altenburg—Chief, Peiping office, German Embassy.
German Information Bureau (an agency of the German Embassy).
Jesco von Puttkamer.
Alfred Romain.
Bureau Ehrhardt (an agency of the German Embassy).
Lothar Eisentrager, alias Ludwig Ehrhardt.
Erich Heise.
Oswald Ulbricht.
Hans Nieman.
Ingward Rudloff.
Bodo Habenicht.
Hans Dethleffs.
Heinz Peerschke.
Hans Mosberg.
Johannes Rathje.
Siegfried Fuellkrug.
Walther Heissig.
Walter Richter.
Hermann Jaeger.
August Stock.
Maria Muller.
Deutsches Nachrichtenburo (also known as DNB, the German News Agency).
Herbert Mueller.

2. Paragraph XV of the petition is amended by adding thereto a new subparagraph (e), following subparagraph (d), reading as follows:

(e) The prisoners at no time having been members of the armed forces of a nation at war with the United States but having been at all times civilian employees of civilian governmental agencies, they were not belligerents and the Military Commission was accordingly without jurisdiction to try them.

12 In United States District Court.

Return to Rule to Show Cause Why Writ of Habeas Corpus Should Not Issue

Filed June 10, 1948

Appear now the respondents herein by their attorney, George Morris Fay, United States Attorney, and for return to the rule to show cause heretofore issued in this cause, admit, deny, and allege as follows:

I. This paragraph of the petition is admitted.

II. Answering paragraph II of the petition, respondents admit they occupy the offices alleged of them, admit that the Commandant of Landsberg Prison is not within the territorial limits of the United States, and deny the remaining allegations thereof.

Further answering, respondents say that they have not, nor has any one of them the custody or keeping of the petitioners.

The respondents say further that the Commandant of Landsberg Prison derives his power and authority from the Commanding General, United States Forces, European Theatre, now redesignated Commanding General, European Command (G. O. USFET No. 48, 10 March 1947) in accordance with letter order A. G. 013.37 GAP—AGO A. P. O. 757, 11 July 1946, which established Landsberg Prison as the "war criminal prison" and makes the Commanding General, Third United States Army, responsible for the operation of that prison and further allege that said Commandant is subject to the direction and supervision of the Commanding General, Third United States Army, and the Commander-in-Chief, European Command and not to that of respondents. A copy of the order establishing Landsberg Prison as the place of imprisonment for war criminals is attached hereto as respondents' Exhibit No. One.

III. Admitted.

IV. Admitted.

V. Answering paragraph V of the petition, admit all thereof except that respondents deny that petitioners were
13 dominated or controlled by the military forces of the Japanese insofar as those acts with which they were charged in the charge and Bill of Particulars (Petitioners' Exhibit C) are concerned.

VI. Admitted.

VII. Admitted.

Further showing to the Court the authority of the said military commission to try petitioners upon the charges specified, respondents show the Court that on December 27, 1945, a directive was issued concerning the apprehension, trial and punishment of war

criminals in the India, Burma, and China Theatres. By this directive, a copy of which is attached hereto and marked Respondents' Exhibit Two, the Commanding General, United States Forces, China Theatre, was advised that he should report to the Joint Chiefs of Staff on war criminals who should be prosecuted by a United States Tribunal.

The said Commanding General did on April 19, 1946, report to the War Department by radio message on the case of the petitioners herein. A copy of this report is attached hereto and marked Respondents' Exhibit Three. This message requested authority of the Joint Chiefs of Staff to try by United States Military Commission in China, these petitioners for their continuing in organized intelligence espionage in China in violation of the terms of the German surrender (Petitioners' Exhibit A).

By radio message (Respondents' Exhibit Four, attached hereto), the Joint Chiefs of Staff on July 6, 1946, granted the authority requested to the Commanding General, United States Army Forces, China Theatre. This authority authorized him to appoint the Commission, approve sentences and designate Germany as the place of confinement.

By reason of subsequent changes in the designation of the United States Military Command in China, specific delegations of the authority originally granted to the Commanding General, United States Forces, China Theatre, were made as follows: (1) on July 9, 1946, to the Commanding General, Nanking, Headquarters
14 Command, as shown by Respondents' Exhibit Five, attached hereto, and (2) on December 3, 1946, to the Commanding General, United States Army Advisory Group, Nanking, China, as shown by Respondents' Exhibit Six, attached hereto.

VIII. Admitted.

IX. Admitted.

X. Admitted.

XI. Admitted.

XII. Answering paragraph XII of the petition, respondents admit no notice of proceedings given to a protecting power, and deny that Article 60 of the Geneva Convention or Paragraph 133 of the Rules of Land Warfare, United States War Department (FM 27-10) (Petitioners' Exhibit H) is applicable to the charges and proceedings had against petitioners as stated in the petition and this return.

XIII. Answering paragraph XIII of the petition, respondents admit that the sentences of the Military Commission were reviewed and approved, with modifications, and ordered into execution at Landsberg Prison, Landsberg, Germany, as stated in the petition. Respondents submit to the Court as Exhibit Seven, a copy of the

review of the proceedings prepared by the Staff Judge Advocate upon which the review and approval was based.

XIV. Admitted.

XV. Denied.

XVI. Denied.

Respondents inform the Court on information and belief that petitioners have presented to and are maintaining a petition for writ of habeas corpus before the United States Military Government Court, Munich, Germany. As to this proceeding, respondents pray that petitioners be required to fully inform the Court, that it may properly exercise its discretion.

Wherefore, respondents pray that the rule be discharged and the petition dismissed.

15 In United States District Court

Petitioner's Answer to Return to Rule to Show Cause

Filed June 21, 1948

Appears now the petitioner herein by his attorneys, and for his answer to the return to the rule to show cause, respectfully shows as follows:

I. Denies the allegation in Paragraph II of the return that respondents do not have the custody or keeping of the petitioners.

The petitioner says further that the Commanding General, European Command (formerly known as Commanding General, United States Forces, European Theatre), the Commanding General, Third United States Army, and the Commandant of Landsberg Prison, and each of them, derive their power and authority from and are subject to the direction and supervision of the respondents.

II. Answering Paragraph VII of the return, petitioner denies that the Supreme High Command of the Red Army participated in or consented to the trial of the prisoners, as was made mandatory by the German surrender terms (Resp. Exh. 3); and denies that the Chinese Government acquiesced in the trial, as was made mandatory by the radio messages from the Joint Chiefs of Staff to the Commanding General, U. S. Army Forces, China and to the Commanding Officer, Nanking Headquarters Command (Resp. Exhs. 4 and 5).

III. Answering Paragraph XVI of the return, the attorney for the petitioner herein states that he has no knowledge or information respecting a petition for writ of habeas corpus allegedly presented to and being maintained before the United States Military Government Court, Munich, Germany.

Wherefore, petitioner prays that the Writ of Habeas Corpus prayed for be issued and that the petitioner and the other prisoners be discharged from the offenses and confinement aforesaid.

* * * * *

16 In United States District Court

Motion for Amendment of Petition for Writ of Habeas Corpus

Filed July 15, 1948

Comes now the petitioner, through his attorneys, and respectfully moves this Honorable Court that the petition herein as amended, be further amended to add the Joint Chiefs of Staff of the United States as parties respondent, by deleting Paragraph II of the original petition, and substituting therefore the following paragraph:

II. That the respondent, James A. Forrestal, is the Secretary of Defense of the United States; the respondent, Kenneth C. Royall, is the Secretary of the Army of the United States; and the respondent, General Omar Bradley, is the Chief of Staff of the United States Army; that the following four persons comprise the Joint Chiefs of Staff of the United States, and as such are joined as respondents: Fleet Admiral William D. Leahy (Chief of Staff to the Commander in Chief of the United States Army and Navy), Admiral Louis E. Denfeld (Chief of Naval Operations), General Omar Bradley (Chief of Staff of the United States Army), and General Hoyt S. Vandenberg (Commanding General of the United States Army Air Forces);—and as such the said respondents have jurisdiction and supervision over the official acts of the said Commandant of Landsberg Prison. The said Commandant of Landsberg Prison is not made a respondent hereto because he is not situated within and cannot be served with process within the territorial limits of the United States. He derives his powers and authority from and is subject to the direction of the respondents, all of whom are located within the District of Columbia.

* * * * *

17 In United States District Court

Order Allowing Amendment of Petition for Writ of Habeas Corpus

Filed Aug. 4, 1948

This cause came on to be heard at this term upon the motion of the petitioner herein for leave to amend his petition for writ of Habeas Corpus and was consented to by counsel for the re-

spondents; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed that petitioner be permitted to amend his petition as prayed for in said motion by deleting paragraph 2 of the original petition and substituting therefor the following paragraph:

II. That the respondent, James A. Forrestal, is the Secretary of Defense of the United States; the respondent, Kenneth C. Royall, is the Secretary of the Army of the United States; and the respondent, General Omar Bradley, is the Chief of Staff of the United States Army; that the following four persons comprise the Joint Chiefs of Staff of the United States, and as such are joined as respondents: Fleet Admiral William D. Leahy (Chief of Staff to the Commander in Chief of the United States Army and Navy), Admiral Louis E. Denfeld (Chief of Naval Operations), General Omar Bradley (Chief of Staff of the United States Army), and General Hoyt S. Vandenberg (Commanding General of the United States Army Air Forces); and as such the said respondents have jurisdiction and supervision over the official acts of the said Commandant of Landsberg Prison. The said Commandant of Landsberg Prison is not made a respondent hereto because he is not situated within and cannot be served with process within the territorial limits of the United States. He derives his powers and authority from and is subject to the direction of the respondents, all of whom are located within the District of Columbia.

EDWARD M. CURRAN,
District Judge.

Dated this 4th day of August 1948.

* * * * * *

18 In United States District Court

Order to Show Cause

Upon the Order issued by the Court granting Plaintiff's motion to amend the complaint filed herein,

Let the defendants, and each of them Omar Bradley, William D. Leahy, Louis E. Denfeld, and Hoyt S. Vandenberg, as Joint Chiefs of Staff, show cause before this Court at a stated term thereof, to be held for the hearing of Motions, in the U. S. District Court, in the City of Washington, D. C., on the 21st day of September, 1948, at 10 o'clock in the morning of said day, or as soon thereafter as counsel can be heard, why an order should not be made and entered in the above entitled action which shall direct that a Writ of Habeas Corpus be issued as requested by the plaintiffs.

Let service of this rule nisi, together with a copy of the complaint on such of the defendants as may be found within this district on or before the 10th day of September, 1948, and answer of the defendants filed on or before the 20th day of September, 1948, be deemed sufficient.

August 23, 1949.

R. B. KEECH, *District Judge.*

* * * * *

In United States District Court

Motion for Leave to Amend Return to Rule to Show Cause

Filed Aug. 31, 1948

Come now the respondents, James A. Forrestal, Kenneth C. Royall and Omar Bradley, by their attorney, George Morris Fay, United States Attorney, and move the Court as follows:

(1) To allow said respondents to amend the return made on their behalf to the rule to show cause, by adding to paragraph 7 at the end thereof, a new clause reading as follows: "By a communication dated November 26, 1946, from the Chinese Minister for Foreign Affairs, Dr. Wang Shihchieh, to the American
19 Ambassador, Dr. J. Leighton Stuart, the Chinese Government acquiesced in the prosecution of war criminals by American military tribunals within the territory of China, as shown by respondents' Exhibit No. 7, attached hereto."

(2) To allow the said respondents to supply a copy of respondents' Exhibit No. 7 as part of the amendment to the return to the rule to show cause.

* * * * *

In United States District Court

Order Granting Motion for Leave to Amend Return

Filed Aug. 31, 1948

Upon consideration of the respondents' motion for leave to file an amendment to their return to the rule to show cause by adding a paragraph to paragraph 7 of said return, and for leave to file an additional exhibit, respondents' Exhibit No. 7, of said amendment, it is by the Court this 31st day of August 1948.

Ordered, that said motion be and is hereby granted.

R. B. KEECH, *Justice.*

* * * * *

In United States District Court

Return to Rule to Show Cause Why Writ of Habeas Corpus Should Not Issue

Filed Sept. 20, 1948

Appear now the respondents herein, by their attorney, George Morris Fay, United States Attorney, and for return to rule to show cause issued on August 23, 1948, in this cause, hereby adopt as their return to the said writ their return hereinbefore filed on June 10, 1948, to a rule to show cause hereinbefore issued on June 1, 1948, except as follows:

Strike answer to paragraph III and substitute the following:

III. Answering amended paragraph III of the petition, respondents deny that petitioners were in the employ of various civilian agencies of the German Government, and aver that they were in the service of the German armed forces as alleged in the original petition filed herein.

Wherefore, respondents pray that the rule be discharged and the petition dismissed.

* * * * *

In United States District Court

Motion for Amendment of Petition for Writ of Habeas Corpus

Filed Sept. 30, 1948

Comes now the petitioner, through his attorneys, and respectfully moves this Honorable Court that the petition herein be further amended as follows:

1. By adding to Paragraph XI of the Petition, at the end thereof, the sentence: "The record of the proceedings before the Military Commission marked 'Exhibit J' is attached hereto and and made a part hereof."

2. By adding to the Petition as "Exhibit J" the record of the proceedings before the Military Commission.

* * * * *

In United States District Court

Order Allowing Amendment of Petition for Writ of Habeas Corpus

Filed Sept. 30, 1948

Upon consideration of the petitioner's motion for leave to file an amendment to his Petition for Writ of Habeas Corpus by add-

ing a sentence to Paragraph XI of the Petition at the end thereof, and by adding an additional exhibit, "Exhibit J," it is by the Court this 30th day of September 1948,

Ordered, that said motion be and is hereby granted.

EDWARD A. TAMM.

* * * * *

21 In United States District Court

Order dismissing petition

Filed Sept. 30, 1948

Upon consideration of the rule to show cause why a writ of habeas corpus should not issue, hereinbefore issued in this case, and the return to the rule, and upon consideration of the argument by counsel herein, and it appearing to the Court that it is without jurisdiction to issue a writ of habeas corpus, the petitioners not being within the jurisdiction of the Court, it is by the Court, this 30th day of September 1948.

Ordered, that the petition for habeas corpus be and the same is hereby dismissed.

EDWARD A. TAMM, *Judge.*

* * * * *

In United States District Court

Opinion

Filed Oct. 6, 1948

TUESDAY, *September 28, 1948.*

Counsel having been heard on the question of jurisdiction, the opinion of the Court was stated as follows:

The Court (Tamm, J.). This case is before the Court on the petition of a number of war prisoners, who admittedly are not now and have never been in the United States. It is a petition naming the heads of the Department of National Defense as defendants and asks that the plaintiff be permitted the process of habeas corpus. The habeas corpus process is authorized to the District Court through the provisions of sections 451 and 452 of the Judicial Code, which provide:

"Power of Courts: The Supreme Court and the District Courts shall have power to issue writs of habeas corpus.

22 "Power of Judges: The several justices of the Supreme Court and the several judges of the circuit courts of appeal and the district courts within their respective jurisdictions shall

have power to grant writs of habeas corpus for the purpose of an inquiry into the causes of restraints of liberty."

The facts at issue were directly raised before the Supreme Court in its last term, in the case of Paul Ahrens et al. v. Tom C. Clark, Attorney General of the United States, 16 Law Week 4640, in which the Supreme Court specifically passed upon the power of the district courts to issue writs of habeas corpus in cases in which the petitioners are not physically within the jurisdiction of the court. In that case Justice Douglas, in delivering the majority opinion of the Supreme Court, stated:

"The question at the threshold of the case is whether the words 'within their respective jurisdictions' limited the district courts to inquiries into the causes of restraints of liberties of those confined or restrained within the territorial jurisdictions of the courts."

"That is our view," says Justice Douglas in expressing the majority opinion of the Supreme Court.

It appearing, consequently, that the Supreme Court has specifically passed upon the question of law presented to this Court, the Court bows to that decision and the petition is dismissed.

In United States District Court

Notice of Appeal

Filed Oct. 6, 1948

Notice is hereby given that the petitioners above named hereby appeal to the Circuit Court of Appeals for the District of Columbia from the order of Judge Edward A. Tamm in the United States District Court for the District of Columbia, dismissing the petition for writ of habeas corpus on the ground of lack of jurisdiction of the United States District Court for the District of Columbia entered in this action on September 28, 1948.

23

WALLACE M. COHEN,
1822 Jefferson Place NW., Washington, D. C.
A. FRANK REEL,
20 Pemberton Square, Boston, Massachusetts,
Attorneys for Petitioners.

24 In the United States Court of Appeals for the District of Columbia Circuit

No. 10053

[Title omitted.]

Joint Appendix of Exhibits

Filed Feb. 3, 1949

25-26 *Exhibit "A"—Act of Military Surrender*

1. We the undersigned, acting by authority of the German High Command, hereby surrender unconditionally to the Supreme Commander, Allied Expeditionary Force and simultaneously to the Supreme High Command of the Red Army all forces on land, at sea, and in the air who are at this date under German control.

2. The German High Command will at once issue orders to all German military, naval and air authorities and to all forces under German control to cease active operations at 2301 hours Central European time on 8th May 1945, to remain in the positions occupied at that time and to disarm completely, handing over their weapons and equipment to the local allied commanders or officers designated by Representatives of the Allied Supreme Commands. No ship, vessel, or aircraft is to be scuttled, or any damage done to their hull, machinery or equipment, and also to machines of all kinds, armament, apparatus, and all the technical means of prosecution of war in general.

3. The German High Command will at once issue to the appropriate commanders, and ensure the carrying out of any further orders issued by the Supreme Commander, Allied Expeditionary Force and by the Supreme High Command of the Red Army.

4. This act of military surrender is without prejudice to, and will be superseded by any general instrument of surrender imposed by, or on behalf of the United Nations and applicable to Germany and the German armed forces as a whole.

5. In the event of the German High Command or any of the forces under their control failing to act in accordance with
with this Act of Surrender, the Supreme Commander, Al-
27 lied Expeditionary Force and the Supreme High Command of the Red Army will take such punitive or other action as they deem appropriate.

6. This Act is drawn up in the English, Russian and German languages. The English and Russian are the only authentic texts.

Signed at Berlin on the 8 day of May 1945.

(S) FRIEDBURG.
(S) KEITEL.
(S) STUMPFF.
/t/ On behalf of the German High Command.

In the Presence of:

(S) A. W. TEDDER,
On behalf of the Supreme Commander, Allied Expeditionary Force.
(S) G. ZHUKOV,
On behalf of the Supreme High Command of the Red Army.

At the signing also were present as witnesses:

(S) S. DE LATTRE-TASSIGNY,
/t/ General Commanding in Chief First French Army.
(S) CARL SPAATZ,
/t/ General, Commanding United States Strategic Air Forces.

28 *Exhibit "B"—Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany by the Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic*

The German armed forces on land, at sea and in the air have been completely defeated and have surrendered unconditionally and Germany, which bears responsibility for the war, is no longer capable of resisting the will of the victorious Powers. The unconditional surrender of Germany has thereby been effected, and Germany has become subject to such requirements as may now or hereafter be imposed upon her.

There is no central Government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers

It is in these circumstances necessary, without prejudice to any subsequent decisions that may be taken respecting Germany, to make provision for the cessation of any further hostilities on the part of the German armed forces, for the maintenance of order in Germany and for the administration of the country, and to announce the immediate requirements with which Germany must comply.

The Representatives of the Supreme Commands of the United States of America, the Union of Soviet Socialist Republics, the

United Kingdom and the French Republic, hereinafter called the "Allied Representatives," acting by authority of their respective Governments and in the interests of the United Nations, accordingly make the following Declaration:

The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and
29 the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption, for the purposes stated above, of the said authority and powers, does not effect the annexation of Germany.

The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory.

In virtue of the supreme authority and powers thus assumed by the four Governments, the Allied Representatives announce the following requirements arising from the complete defeat and unconditional surrender of Germany with which Germany must comply:

ARTICLE 1

Germany, and all German military, naval and air authorities and all forces under German control shall immediately cease hostilities in all theatres of war against the forces of the United Nations on land, at sea and in the air.

ARTICLE 2

(a) All armed forces of Germany or under German control, wherever they may be situated, including land, air, anti-aircraft and naval forces, the S. S., S. A. and Gestapo, and all other forces or auxiliary organizations equipped with weapons, shall be completely disarmed, handing over their weapons and equipment to local Allied Commanders or to officers designated by the Allied Representatives.

(b) The personnel of the formations and units of all the forces referred to in paragraph (a) above shall, at the discretion of the Commander-in-Chief of the Armed Forces of the Allied State concerned, be declared to be prisoners of war, pending fur-
30 ther decisions, and shall be subject to such conditions and directions as may be prescribed by the respective Allied Representatives.

(c) All forces referred to in paragraph (a) above, wherever they may be, will remain in their present positions pending instructions from the Allied Representatives.

(d) Evacuation by the said forces of all territories outside the frontiers of Germany as they existed on the 31st December 1937, will proceed according to instructions to be given by the Allied Representatives.

(e) Detachments of civil police to be armed with small arms only, for the maintenance of order and for guard duties, will be designated by the Allied Representatives.

ARTICLE 3

(a) All aircraft of any kind or nationality in Germany or German-occupied or controlled territories or waters, military, naval or civil, other than aircraft in the service of the Allies, will remain on the ground, on the water or aboard ships pending further instructions.

(b) All German or German-controlled aircraft in or over territories or waters not occupied or controlled by Germany will proceed to Germany or to such other place or places as may be specified by the Allied Representatives.

ARTICLE 4

(a) All German or German-controlled naval vessels, surface and submarine, auxiliary naval craft, and merchant and other shipping, wherever such vessels may be at the time of this Declaration, and all other merchant ships of whatever nationality in German ports, will remain in or proceed immediately to ports and bases as specified by the Allied Representatives. The crews of such vessels will remain on board pending further instructions.

(b) All ships and vessels of the United Nations, whether or not title has been transferred as the result of prize court or other proceedings, which are at the disposal of Germany or under
31 German control at the time of this Declaration, will proceed at the dates and to the ports or bases specified by the Allied Representatives.

ARTICLE 5

(a) All or any of the following articles in the possession of the German armed forces or under German control or at German disposal will be held intact and in good condition at the disposal of the Allied Representatives for such purposes and at such times and places as they may prescribe—

(i) all arms, ammunition, explosives, military equipment, stores and supplies and other implements of war of all kinds and all other war material:

(ii) all naval vessels of all classes, both surface and submarine, auxiliary naval craft and all merchant shipping, whether afloat, under repair or construction, built or building;

(iii) all aircraft of all kinds, aviation and antiaircraft equipment and devices;

(iv) all transportation and communications facilities and equipment by land, water or air;

(v) all military installations and establishments, including airfields, seaplane bases, ports and naval bases, storage depots, permanent and temporary land and coast fortifications, fortresses and other fortified areas, together with plans and drawings of all such fortifications, installations and establishments;

(vi) all factories, plants, shops, research institutions, laboratories, testing stations, technical data, patents, plans, drawings and inventions, designed or intended to produce or to facilitate the production or use of the articles, materials and facilities referred to in subparagraphs (i), (ii), (iii), (iv) and (v) above or otherwise to further the conduct of war.

(b) At the demand of the Allied Representatives the following will be furnished:

(i) the labour, services and plant required for the maintenance or operation of any of the six categories mentioned in paragraph (a) above; and

32 (ii) any information or records that may be required by the Allied Representatives in connection with the same.

(c) At the demand of the Allied Representatives all facilities will be provided for the movement of Allied troops and agencies, their equipment and supplies, on the railways, roads and other land communications or by sea, river or air. All means of transportation will be maintained in good order and repair, and the labour, services and plant necessary therefor will be furnished.

ARTICLE 6

(a) The German authorities will release to the Allied Representatives, in accordance with the procedure to be laid down by them, all prisoners of war at present in their power belonging to the forces of the United Nations, and will furnish full lists of these persons, indicating the places of their detention in Germany or territory occupied by Germany. Pending the release of such prisoners of war, the German authorities and people will protect them in their persons and property and provide them with adequate food, clothing, shelter, medical attention and money in accordance with their rank or official position.

(b) The German authorities and people will in like manner provide for and release all other nationals of the United Nations who are confined, interned or otherwise under restraint, and all

other persons who may be confined, interned or otherwise under restraint for political reasons or as a result of any Nazi action, law or regulation which discriminates on the ground of race, colour, creed or political belief.

(c) The German authorities will, at the demand of the Allied Representatives, hand over control of places of detention to such officers as may be designated for the purpose by the Allied Representatives.

ARTICLE 7

The German authorities concerned will furnish to the Allied Representatives:

33 (a) full information regarding the forces referred to in Article 2 (a), and, in particular, will furnish forthwith all information which the Allied Representatives may require concerning the numbers, locations and dispositions of such forces, whether located inside or outside Germany;

(b) complete and detailed information concerning mines, minefields and other obstacles to movement by land, sea or air, and the safety lanes in connection therewith. All such safety lanes will be kept open and clearly marked; all mines, minefields and other dangerous obstacles will as far as possible be rendered safe, and all aids to navigation will be reinstated. Unarmed German military and civilian personnel with the necessary equipment will be made available and utilized for the above purposes and for the removal of mines, minefields and other obstacles as directed by the Allied Representatives.

ARTICLE 8

There shall be no destruction, removal, concealment, transfer, or scuttling of, or damage to, any military, naval, air, shipping, port, industrial and other like property and facilities and all records and archives, wherever they may be situated, except as may be directed by the Allied Representatives.

ARTICLE 9

Pending the institution of control by the Allied Representatives over all means of communication, all radio and telecommunication installations and other forms of wire or wireless communications, whether ashore or afloat, under German control, will cease transmission except as directed by the Allied Representatives.

ARTICLE 10

The forces, ships, aircraft, military equipment, and other property in Germany or in German control or service or at German

disposal, of any other country at war with any of the Allies,
34 will be subject to the provisions of this Declaration and of any proclamations, orders, ordinances or instructions issued thereunder.

ARTICLE 11

(a) The principal Nazi leaders as specified by the Allied Representatives, and all persons from time to time named or designated by rank, office or employment by the Allied Representatives as being suspected of having committed, ordered or abetted war crimes or analogous offenses, will be apprehended and surrendered to the Allied Representatives.

(b) The same will apply in the case of any national of any of the United Nations who is alleged to have committed an offence against his national law, and who may at any time be named or designated by rank, office or employment by the Allied Representatives.

(c) The German authorities and people will comply with any instructions given by the Allied Representatives for the apprehension and surrender of such persons.

ARTICLE 12

The Allied Representatives will station forces and civil agencies in any or all parts of Germany as they may determine.

ARTICLE 13

(a) In the exercise of the supreme authority with respect to Germany assumed by the Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, the four Allied Governments will take such steps, including the complete disarmament and demilitarization of Germany, as they deem requisite for future peace and security.

(b) The Allied Representatives will impose on Germany additional political, administrative, economic, financial, military and
35 other requirements arising from the complete defeat of Germany. The Allied Representatives, or persons or agencies duly designated to act on their authority, will issue proclamations, orders, ordinances and instructions for the purpose of laying down such additional requirements, and of giving effect to the other provisions of this Declaration. All German authorities and the German people shall carry out unconditionally the requirements of the Allied Representatives, and shall fully comply with all such proclamations, orders, ordinances and instructions.

ARTICLE 14

This Declaration enters into force and effect at the date and hour set forth below. In the event of failure on the part of the German authorities or people promptly and completely to fulfill their obligations hereby or hereafter imposed, the Allied Representatives will take whatever action may be deemed by them to be appropriate under the circumstances.

ARTICLE 15

This Declaration is drawn up in the English, Russian, French and German languages. The English, Russian and French are the only authentic texts.

5 June 1945. Berlin. Hours—Central European Time.

The word "nationals" has been omitted pending check.

Signed by the Allied Representatives:

(S) DWIGHT D. EISENHOWER,
General of the Army, U. S. A.

(S) G. ZHUKOV,

(S) B. L. MONTGOMERY,
Field-Marshal,

(S) S. DE LATTRE-TASSIGNY,
Général d'Armie.

36 *Exhibit "C"—Charge*

That between 8 May and 15 August 1945, Lothar Eisentraeger alias Ludwig Ehrhardt, Franz Siebert, Herbert Glietsch, Johannes Otto, Erich Heise, Oswald Ulbricht, Hans Niemann, Ingward Rudloff, Bodo Habenicht, Hans Dethleffs, Wolf Schenke, Heinz Poerschke, Hans Mosberg, Johannes Rathje, Siegfried Fuellkrug, Walther Heissig, Jesco von Puttkamer, Alfred Romain, Ernst Woermann, Wilhelm Stoller, Elgar von Randow, Walter Richter, Hermann Jaeger, Felix Altenburg, Herbert Mueller, August Stock, Maria Muller, individually and as officials, nationals, citizens, agents or employees of Germany, while residing in China at a time when the United States of America was at war with Japan, did in China in a Theatre of military operations, knowingly, wilfully and unlawfully violate the unconditional German surrender by engaging in and continuing military activity against the United States and its allies, to wit, by furnishing, ordering, authorizing, permitting and failing to stop the furnishing of aid, assistance, information, advice, intelligence, propaganda and materials to the Japanese armed forces and agencies thereof, by such acts of treachery assisting Japan in waging

war against United States of America, in violation of the laws and customs of war.

Bill of Particulars

1. That between 8 May and 15 August 1945, Lothar Eisentraeger, alias Ludwig Ehrhardt, a member of the German Embassy to enemy-occupied China, as head of a German intelligence agency known as the Bureau Ehrhardt, a unit of the German High Command, did individually at Shanghai and by his agents at Shanghai, Canton and Peiping, wilfully and unlawfully engage in military activity, against the United States and its allies, to wit, the collection of military intelligence concerning, inter
37 alia, land, sea and air movements by the United States and its allies and transmission of it to the Japanese armed forces; that on or about 8 May 1945, as head of the Bureau Ehrhardt, he did wilfully and unlawfully transmit through the Shanghai Office of the German Embassy in China, a telegram ordering, authorizing and permitting his agents in Canton and Peiping to furnish aid and intelligence to the Japanese armed forces; that he did wilfully and unlawfully order, authorize and permit his agents in Shanghai to furnish aid and intelligence to the Japanese armed forces.

2. That between 8 May and 15 August 1945, Franz Siebert, in his position as German Consul General, former German Consul General and a leader of the German community at Canton, did at Canton wilfully and unlawfully order, authorize, permit and fail to stop the continuation of German military activity against the United States and its allies, to wit, the collection of military intelligence concerning the United States and its allies and transmission of it to the Japanese armed forces, by persons under his control, namely Erich Heise, Oswald Ulbricht, Hans Niemann and others; and that he did wilfully and unlawfully order and instruct representatives of German business firms, on or about 15 May 1945 to submit to him lists of essential war materials in their possession which lists on or about 1 and 7 June 1945 were submitted by him to the Japanese armed forces enabling them to secure control and make use of said materials; and that he did on or about 15 May 1945 wilfully and unlawfully order all German citizens and nationals in the Canton area, at a called meeting, to obey his commands to continue active assistance to the Japanese authorities under penalty of punishment by the Japanese.

3. That between 8 May and 15 August 1945, Herbert Gletsch, in his position as Secretary and former Secretary of the German Consulate at Canton, as a leader of the German community there, and agent of the German High Command, did at Canton

38 wilfully and unlawfully order, authorize, permit and fail to stop the continuation of German military activity against the United States and its allies to wit, the collection of intelligence concerning inter alia, land, sea and air movements by the United States and its allies and transmission of it to the Japanese armed forces; by persons under his control, namely Erich Heise, Oswald Ulbricht and Hans Niemann; that he decoded, approved and delivered on or about 15 May 1945 to Erich Heise, Canton chief of the Bureau Ehrhardt, a German High Command intelligence agency, a telegram dated on or about 8 May 1945 which unlawfully ordered and authorized the continuation of military activity.

4. That between 8 May and 15 August 1945, Johannes Otto, in his position as head of the Nazi Party in South China and a leader of the German community there, did at Canton wilfully and unlawfully authorize, permit and fail to stop the continuation of German military activity against the United States and its allies, to wit, the collection of military intelligence concerning, inter alia, land, sea and air movements by the United States and its allies, and transmission of it to the Japanese armed forces by persons of the community under his control, namely Erich Heise, Oswald Ulbricht, Hans Niemann and others.

5. That between 8 May and 15 August 1945, Erich Heise, member and agent of the Bureau Ehrhardt, an intelligence unit of the German High Command and head of its Canton office, known as the Office Heise, did at Canton wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection of military intelligence concerning, inter alia, land, sea, and air movements by the United States and its allies and transmission of it and information and advice to the Japanese armed forces; and that he did wilfully and
39 unlawfully order and permit persons under his control, namely Oswald Ulbricht, Hans Niemann and others to engage in the same unlawful activity.

6. That between 8 May and 15 August 1945, Oswald Ulbricht, member and agent of the Bureau Ehrhardt, an intelligence agency of the German High Command, and employed in its office at Canton, known as the Office Heise, did thereat wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea, and air movements by the United States and its allies and the rendering of other aid, assistance and advice to the Office Heise knowing it was for the use and benefit of and furnished to the Japanese armed forces.

7. That between 8 May and 15 August 1945, Hans Niemann, member and agent of the Bureau Ehrhardt, an intelligence agency

of the German High Command and employed in its office at Canton, known as the Office Heise, did thereat wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea, and air movements, by the United States and its allies and the rendering of other aid, assistance and advice to the Office Heise knowing it was for the use and benefit of and furnished to the Japanese armed forces.

8. That between 8 May and 15 August 1945, Ingward Rudloff, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, did at Shanghai wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea, and air movements by the United States and its allies and the rendering of other aid, assistance and advice to the Bureau Ehrhardt, knowing it was for the use and benefit of and furnished to the Japanese armed forces.

9. That between 8 May and 15 August 1945, Bodo Habenicht, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, did at Shanghai wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea, and air movements, by the United States, and its allies and the rendering of other aid, assistance and advice to the Bureau Ehrhardt knowing it was for the use and benefit of and furnished to the Japanese armed forces.

10. That between 8 May and 15 August, Hans Dethleffs, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, did at Shanghai wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea, and air movements by the United States and its allies and the rendering of other aid, assistance, and advice to the Bureau Ehrhardt knowing it was for the use and benefit of and furnished to the Japanese armed forces.

11. That between 8 May and 15 August 1945, Wolf Schenke, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, did at Shanghai, wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea, and air movements by the United States

and its allies and the rendering of other aid, assistance and advice to the Bureau Ehrhardt knowing it was for the use and benefit of and furnished to the Japanese armed forces.

12. That between 8 May and 15 August 1945, Heinz Peerschke, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, did at Shanghai wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea, and air movements by the United States and its allies and the rendering of other aid, assistance and advice to the Bureau Ehrhardt knowing it was for the use and benefit of and furnished to the Japanese armed forces.

13. That between 8 May and 15 August 1945, Hans Mosberg, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, did at Shanghai wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea, and air movements by the United States and its allies and the rendering of other aid, assistance and advice to the Bureau Ehrhardt knowing it was for the use and benefit of and furnished to the Japanese armed forces.

14. That between 8 May and 15 August 1945, Johannes Rathje, a member, agent and employee of the Bureau Ehr-
42 hardt, an intelligence agency of the German High Command, did at Shanghai wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea, and air movements by the United States and its allies and rendering of other aid, assistance and advice to the Bureau Ehrhardt, knowing it was for the use and benefit of and furnished to the Japanese armed forces.

15. That between 8 May and 15 August 1945, Siegfried Fuellkrug, a member, agent and employee of the Bureau Ehrhardt, an intelligence unit of the German High Command and head of its Peiping office, known as the Office Fuellkrug, did at Peiping wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection of military intelligence concerning, inter alia, land, sea and air movements by the United States and its allies and transmission of it and information and advice on political and military conditions, plans and happenings in North China, Mongolia and the Union of Soviet Socialist Republics to the Bureau Ehrhardt and the Japanese armed forces; and that he did order, permit and authorize persons under

his control, to wit, August Stock, Walther Heissig and Maria Muller to engage in such unlawful activity.

16. That between 8 May and 15 August 1945, Walther Heissig, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command and employed in its office at Peiping, known as the Office Fuelkrug, did thereat wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, translation and compilation of military intelligence concerning, inter alia, land, sea and air movements by the United States and its
43 allies and transmission of it and information and advice on political and military conditions, plans and happenings in North China, Mongolia and the Union of Soviet Socialist Republics to the Bureau of Ehrhardt and the Japanese armed forces; and that he did order, permit and authorize persons under his control, to wit, August Stock and Maria Muller, to engage in similar unlawful activity.

17. That between 8 May and 15 August 1945, Jesco von Puttkamer, in his position as head of the German Information Bureau, Shanghai, a military propaganda agency of the German Embassy to enemy-occupied China, did thereat individually and by his agents wilfully and unlawfully engage in military activity against the United States and its allies, to wit, psychological warfare by designing, preparing and furnishing to the Japanese armed forces for their use propaganda material in the English language consisting of, inter alia, leaflets, posters, and photographs designed to influence, adversely to the United States and its allies, the actions of United States troops and civilian populations; and that he did wilfully and unlawfully furnish military advice, information and intelligence to the Japanese armed forces.

18. That between 8 May and 15 August 1945, Alfred Romain, a member and employee of the German Information Bureau, Shanghai, a military propaganda agency of the German Embassy to enemy-occupied China, did at Shanghai wilfully and unlawfully engage in military activity against the United States and its allies, to wit, psychological warfare by designing, preparing and furnishing to the German Information Bureau and to the Japanese armed forces for use by the latter, propaganda material in the English language, consisting of inter alia, leaflets, posters, designs and photographs intended to influence, ad-
44 versely to the United States and its allies, the actions of United States troops and civilian populations.

19. That between 8 May and 15 August 1945, Ernst Woermann, in his position as German Ambassador to enemy-occupied China, former German Ambassador, head of the German community there and the superior of Lothar Eisentrager, alias Ludwig Ehr-

hardt, diplomatic official and head of the Bureau Ehrhardt, a German High Command intelligence agency, and in control of the German Information Bureau, a military propaganda agency, did in China willfully and unlawfully order, authorize, permit and fail to stop German military activity against the United States and its allies, by those under his command and control, to wit, the collection and analysis by the Bureau Ehrhardt of intelligence in Shanghai, Canton and Peiping and preparation by the German Information Bureau of propaganda material in Shanghai against the United States and its allies and transmission of both to the Japanese armed forces for their use.

20. That between 8 May and 15 August 1945, Wilhelm Stoller, in his position as chief of the Shanghai Office of the German Embassy to enemy-occupied China, and the superior of Lothar Eisentrager, alias Ludwig Ehrhardt, diplomatic official and head of the Bureau Ehrhardt, a German High Command intelligence agency, and in control of the German Information Bureau, a military propaganda Agency, as former chief of such Embassy Office and a head of the German community in Shanghai, did at Shanghai wilfully and unlawfully order, authorize, permit and fail to stop the continuation of German military activity against the United States and its allies, by those under his command and control, to wit, the collection by the Bureau Ehrhardt of intelligence in Shanghai, Canton and Peiping and preparation by the German Information Bureau of propaganda material in Shanghai against the United States and its allies and transmission of both to the Japanese armed forces; that unlawful activity of intelligence nature took place in Canton and Peiping pursuant to his direction and approval expressed in a telegram to the German Consulate at Canton and the Embassy Office at Peiping signed by him, dated on or about 8 May 1945 and duly delivered.

21. That between 8 May and 15 August 1945, Elgar von Randow, in his position as Counselor of the Shanghai Office of the German Embassy to enemy-occupied China and the immediate superior of Lothar Eisentrager, alias Ludwig Ehrhardt, diplomatic official and head of the Bureau Ehrhardt, a German High Command intelligence agency, and in immediate control of the German Information Bureau, a military propaganda agency, as former counselor of such office and a head of the German community in Shanghai, did at Shanghai, wilfully and unlawfully order, authorize, permit and fail to stop the continuation of German military activity against the United States and its allies, by those under his command and control, to wit, the collection by the Bureau Ehrhardt of intelligence in Shanghai, Canton and Peiping and preparation by the German Information Bureau of

propaganda material in Shanghai against the United States and its allies and transmission of both to Japanese armed forces; that unlawful activity of intelligence nature took place in Canton and Peiping pursuant to his direction and approved expressed in a telegram to the German Consulate at Canton and the Embassy Office at Peiping, approved and dispatched by him on or about 8 May 1945, and duly delivered.

22. That between 8 May and 15 August 1945, Walter Richter, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, did at Shanghai wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea and air movements by the United States and its allies and the rendering of other aid, assistance and advice to the Bureau Ehrhardt, knowing it was for the use and benefit of and furnished to the Japanese armed forces.

46

23. That between 8 May and 15 August 1945, Herman Jaeger, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, did at Shanghai wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea and air movements of the United States and its allies and the rendering of other aid, assistance and advice to the Bureau Ehrhardt, knowing it was for the use and benefit of and furnished to the Japanese armed forces.

24. That between 8 May and 15 August 1945, Felix Altenburg, in his position as chief of the Peiping Office of the German Embassy to enemy-occupied China and the superior of Siegfried Fuellkrug who was a member of the Embassy staff and head of the Peiping unit of the German High Command's intelligence agency in China, namely the Bureau Ehrhardt, as former chief of such Embassy Office and a leader of the Germany community at Peiping, did at Peiping wilfully and unlawfully, order, authorize, permit and fail to stop the continuation by persons under his control, to wit, Siegfried Fuellkrug, Walther Heissig, Herbert Mueller, August Stock, Maria Muller and others, of military activity against the United States and its allies, to wit, the collection of intelligence concerning, inter alia, land, sea and air movements by the United States and its allies, and transmission of it and analysis of and advice on political and military conditions, plans and happenings in North China, Mongolia and the Union of Soviet Socialist Republics and other nations allied with the United States to the Japanese armed forces.

47

25. That between 8 May and 15 August 1945, Herbert Mueller, in his position as agent of the Peiping office of a German government news and propaganda agency, Deutsches Nachrichtenburo, also known as DNB, did at Peiping wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, interpretation, edition, analysis and transmission to the Japanese armed forces of economic, political and military inteligence, including that which he daily intercepted from radio broadcasts by the United States and its allies.

26. That between 8 May and 15 August 1945, August Stock, member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, and employed in its office at Peiping known as the Office Fuellkrug did thereat wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, translation and analysis of military intelligence concerning, inter alia, land, sea and air movements by the United States and its allies, and transmission of it and information on political and military conditions, plans and happenings in North China, Mongolia and the Union of Soviet Socialist Republics to the Japanese armed forces and to the Bureau Ehrhardt, knowing it was for the use and benefit of and furnished to the Japanese armed forces.

5 Yrs. [Reduced to 2 Yrs.]

27. That between 8 May and 15 August 1945, Maria Muller, member agent and employee of the Bureau Ehrhardt, an in-
48 telligence agency of the German High Command and employed in its office at Peiping known as the Office Fuellkrug, did thereat wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, translation and analysis of military intelligence concerning, inter alia, land, sea and air movements by the United States and its allies and transmission of it and information on political and military conditions and happenings in North China, Mongolia and the Union of Soviet Socialist Republics to the Japanese armed forces and to the Bureau Ehrhardt, knowing it was for the use and benefit of and furnished to the Japanese armed forces.

Exhibit "F"

Restricted

HEADQUARTERS,
UNITED STATES FORCES, CHINA THEATER.

APO 971
AG 000.5 (21 Jan 46) JA *21 January 1946.*

Subject: Regulations Governing the Trial of War Criminals

The following rules and regulations will govern the trials of persons, units and organizations accused as War Criminals in this theater:

ESTABLISHMENT OF MILITARY COMMISSIONS

1. General. Trial of persons, units, and organizations accused as War Criminals will be by military commissions to be convened by the Commanding General, United States Army Forces, China Theater.

2. Number and Types. The number and types of commissions to be established will depend upon the number and nature of the offenses involved and of the offenders to be tried. Such
49 commissions may include members of any one branch or of several branches of the armed services, to try cases involving offenses against any one or more of such service branches, or any other offenses.

JURISDICTION

3. Over Territory. The military commissions established hereunder shall have jurisdiction over all of China, co-extensive with the China Theater of Operations, and territory now or formerly belonging to China, including Formosa, Manchuria, and Hainan Island, and other areas wherein the armed forces commanded by the Commanding General, United States Army Forces, China Theater, are or have been stationed.

4. Over Persons. a. The military commissions established hereunder shall have jurisdiction over all persons, units or organizations within China Theater of Operations including Formosa, Manchuria and Hainan Island and other areas wherein the armed forces, commanded by the Commanding General, United States Army Forces, China Theater are or have been stationed.

b. Any military or Naval unit or any official or un-official group or organization, whether or not still in existence, may be charged with criminal acts or complicity therein and tried by a military commission.

c. The convening authority may specify particular offenders to be tried before any commission appointed by him.

5. Over Offenses. a. The military commissions established hereunder shall have jurisdiction over the following offenses: Violations of the laws or customs of war, including but not limited to murder, torture or ill-treatment of prisoners of war or persons on the seas; killing or ill-treatment of hostages; murder, torture or ill-treatment, or deportation to slave labor or for any other illegal purposes, of civilians of, or in, occupied territory; plunder of public or private property; wanton destruction of cities, towns or villages; devastation, destruction or damage of public or private property not justified by military necessity; murder, extermination, enslavement, deportation or other inhuman acts committed against any civilian population, or persecution on political, racial, national or religious grounds, in execution of or connection with any offense within the jurisdiction of the commission, whether or not in violation of the domestic law of the country where perpetrated; and all other offenses against the laws or customs of war; participation in a common plan or conspiracy to accomplish any of the foregoing. Leaders, organizers, instigators, accessories and accomplices participating in the formulation or execution of any such common plan or conspiracy will be held responsible for all acts performed by any person in execution of that plan or conspiracy.

b. Persons whose offenses have a particular geographical location outside the China Theater of Operations may be returned to the scene of their crimes for trial by competent military or civil tribunals of local jurisdiction. In the event a person is requested for trial in two (2) or more countries, the Commanding General, United States Army Forces, China Theater, will determine the place of trial on the basis of the relative gravity of the respective charges and other relevant circumstances.

MEMBERSHIP OF COMMISSION

6. Appointment. The members of each military commission will be appointed by the Commanding General, United States Army Forces, China Theater, or under authority delegated by him. The appointment may be made in the order convening the commission or in a separate order. Alternates may be appointed by the convening authority. Such alternates shall attend all sessions of the commission and in case of illness or other incapacity of any principal member, an alternate shall take the place of that member. Any vacancy among the members or alternates occurring after a trial has begun may be filled by the convening authority, but

51 the substance of all proceedings had and evidence taken in that case shall be made known to that new member or alternate in open court before the trial proceeds.

7. Number of Members. Each commission shall consist of not less than three (3) members.

8. Qualifications. The convening authority shall appoint to the commission persons whom he determines to be competent to perform the duties involved and not disqualified by personal interest or prejudices: provided, that no person shall be appointed to hear a case which he personally investigated, nor if he is required as a witness in that case. A commission may consist of Army and other service personnel, or of both service personnel and civilians. If feasible, one or more members of a commission should have had legal training.

9. Quorum and Voting. A quorum shall consist of two-thirds (⅔) of the members of the commission, or alternates (if any) acting as members, but in no event less than three (3) members. All decisions of the commission shall be by majority vote of the members present when the vote is taken, which shall be a quorum, except that conviction and sentence shall be by the affirmative votes of not less than two-thirds (⅔) of the members of the quorum. In case of a tie vote, the vote of the presiding member will determine.

10. Presiding Member. In the event the convening authority does not name one of the members as the presiding member the senior officer among the members of the commission present shall preside, or such other member as the senior officer may designate.

Prosecutors

11. Appointment. The convening authority shall designate one or more persons to conduct the prosecution before each commission.

52 12. Duties. The duties of the prosecutor are:

a. To determine the offenses and the offenders to be tried before the commission in addition to those specifically ordered by the convening authority.

b. To prepare and present to the commission charges and specifications.

c. To prepare cases for trial and to conduct the prosecution of each case before the commission.

Powers and Procedure of Commissions

13. Conduct of the Trial. A Commission shall:

a. Confine each trial strictly to a fair, expeditious hearing on the issues raised by the charges, excluding irrelevant issues or evidence and preventing any unnecessary delay or interference.

b. Deal summarily with any contumacy or contempt, imposing any appropriate punishment therefor.

c. Sessions of a commission shall be public except when otherwise directed by the commission.

d. A commission shall hold each session at such time and place as it shall determine or as may be directed by the convening authority.

14. Rights of the Accused. The accused shall be entitled:

a. To have in advance of trial a copy of the charges and specifications, so worded as clearly to apprise the accused of each offense charged.

b. To be represented prior to and during trial by counsel of his own choice, or to conduct his own defense. If the accused fails to designate his counsel, the commission shall appoint competent counsel to represent or advise the accused.

c. To have his own counsel present relevant evidence at the trial in support of his defense, and cross-examine each adverse witness who personally appears before the commission.

d. To have the charges and specifications, the proceedings and any documentary evidence translated when he is unable otherwise to understand them.

53 15. Witnesses. The commission shall have power:

a. To summon witnesses and require their attendance and testimony under penalty; to administer oaths or affirmation to witness and other persons, and to question witnesses.

b. To require the production of documents and other evidentiary material.

c. To have evidence taken by a special commissioner appointed by the commission.

16. Evidence. a. The commission shall admit such evidence as in its opinion would be of assistance in proving or disproving the charges, or such as in the commission's opinion would have probative value in the mind of a reasonable man. In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:

(1) Any document which appears to the commission to have been signed or issued officially by any officer, department, agency, or member of the armed forces of any government, without proof of the signature or of the issuance of the document.

(2) Any report which appears to the commission to have been signed or issued by the International Red Cross or a member thereof, or by a medical doctor or any medical service personnel, or by an investigator or intelligence officer, or by any other person whom the commission finds to have been acting in the course of his duty when making the report.

(3) Affidavits, depositions, or other statements taken by an officer detailed for that purpose by military authority.

(4) Any diary, letter or other document appearing to the commission to contain information relating to the charge.

(5) A copy of any document or other secondary evidence of its contents.

(6) Hearsay evidence.

54 b. The commission shall take judicial notice of facts of common knowledge, official government documents of any nation, and the proceedings, records and findings of military or other agencies of any of the United Nations.

c. A commission may require the prosecution and the defense to make a preliminary offer of proof, whereupon the commission may rule in advance on the admissibility of such evidence.

d. If the accused is charged with an offense involving concerted criminal action upon the part of a military or naval unit, or any group or organization, evidence which has been given previously at a trial of any other member of that unit, group or organization, relative to that concerted offense, may be received as prima facie evidence that the accused likewise is guilty of that offense.

e. The findings and judgment of a commission in any trial of a unit, group or organization with respect to the criminal character, purpose or activities thereof shall be given full faith and credit in any subsequent trial by that or any other commission of an individual person charged with criminal responsibility through membership in that unit, group or organization. Upon proof of membership in such unit, group or organization convicted by a commission, the burden of proof shall shift to the accused to establish any mitigating circumstances relating to his membership or participation therein.

f. The official position of the accused shall not absolve him from responsibility, or be considered in mitigation or punishment. Further, action pursuant to order of the accused's superior, or of his government, shall not constitute a defense, but may be considered in mitigation of punishment if the commission determines that justice so requires.

17. Trial Procedure. The proceedings at each trial will be conducted substantially as follows, unless modified by the commission to suit the particular circumstances:

55 a. Each charge and specification will be read, or its substance stated, in open court.

b. The presiding member shall ask each accused whether he pleads "Guilty" or "Not Guilty".

c. The prosecution shall make its opening statement.

d. The presiding member may, at this or any other time, require the prosecutor to state what evidence he proposes to submit to the

commission, and the commission thereupon may rule upon the admissibility of such evidence.

e. The commission may put any question to any witness and to any accused at any time. The prosecution and the defense may then further examine and/or cross-examine any such witness or accused.

f. The witnesses and other evidence for the prosecution shall be heard or presented. At the close of the case for the prosecution, the commission may, on motion of the defense for a finding of not guilty, consider and rule whether the evidence before the commission supports the charges against the accused. The commission may defer action on any such motion and permit or require the prosecution to reopen its case and produce any further available evidence.

g. The defense may make an opening statement prior to presenting its case. The presiding member may, at this or any other time, require the defense to state what evidence they propose to submit to the commission, whereupon the commission may rule upon the admissibility of such evidence.

h. The witnesses and other evidence for the defense shall be heard or presented. Thereafter, the prosecution and defense may introduce such evidence in rebuttal as the commission may rule admissible.

i. The defense, and thereafter the prosecution, shall address the commission.

j. The commission shall consider the case in closed session and thereafter in open court deliver its judgment, and in the event of a conviction shall pronounce sentence.

56 18. Record of Proceedings. Each commission shall make a separate record of its proceedings in the trial of each case brought before it. The record shall be prepared by the prosecutor under the direction of the commission and submitted to the defense counsel. The commission shall be responsible for its accuracy. Such record, certified by the presiding member of the commission or his successor, shall be delivered to the convening authority as soon as possible after the trial.

JUDGMENT AND SENTENCE

19. Judgment. The judgment of a commission as to guilt or acquittal shall be delivered in open court. It may state the reasons on which based.

20. Sentence. The commission may sentence an accused, upon conviction, to death by hanging or shooting, imprisonment for life or for any less term, fine, or such other punishment as the commission shall determine to be proper. The commission may

also order confiscation of any property of a convicted accused, deprive that accused of any stolen property, or order its delivery to the Commanding General, United States Army Forces, China Theater, for disposition as he shall find be proper, or may order restitution with appropriate penalty in cases of default.

21. Approval of Sentence. No sentence, including the death sentence, of a military commission shall be carried into effect until approved by the Commanding General, United States Army Forces, China Theater, or his successor. He shall have authority to approve, mitigate, remit, commute, suspend, reduce or otherwise alter the sentence imposed, or (without prejudice to accused) remand the case for rehearing before a new military commission; but he shall not have authority to increase the severity of the sentence. Except as herein provided, the judgment and sentence and interlocutory rulings of a commission shall be final
57 and not subject to review. No appeal may be taken from the judgment and/or sentence of a commission to any civil court or higher military authority.

RULE MAKING POWER

22. Supplementary Rules and Forms. Each commission shall adopt rules and forms to govern its procedure, not inconsistent with the provisions hereof or such rules and forms as may be prescribed by the convening authority, to-wit, the Commanding General, United States Army Forces, China Theater.

By Command of Lieutenant General Wedemeyer:

(S) PAUL W. CARAWAY,
Brigadier General, GSC,
Acting Chief of Staff.

Exhibit "G"—Findings and Sentences

Colonel MALLAN. These findings and sentences are as follows:

You, Lothar Eisentrager, alias Ludwig Ehrhardt, of the charge as amended Guilty, and are sentenced to be confined at hard labor, at such place as the reviewing authority may direct for the remainder of your natural life.

You, Ingward Rudloff, of the charge as amended Guilty, and are sentenced to be confined at hard labor, at such place as the reviewing authority may direct for ten (10) years.

You, Bodo Habenicht, of the charge as amended Guilty, and are sentenced to be confined at hard labor, at such place as the reviewing authority may direct for ten (10) years.

You, Hans Dethleffs, of the charge as amended Guilty, and are sentenced to be confined at hard labor, at such place as the reviewing authority may direct for ten (10) years.

58 You, Heinz Peerschke, of the charge as amended Guilty, and are sentenced to be confined at hard labor, at such place as the reviewing authority may direct for five (5) years.

You, Hans Mosberg, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for twenty (20) years.

You, Johannes Rathje, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for fifteen (15) years.

You, Walter Richter, of the charge as amended Guilty and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for ten (10) years.

You, Herman Jaeger, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for ten (10) years.

You, Jesco von Puttkamer, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for thirty (30) years.

You, Alfred Romain, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for thirty (30) years.

You, Franz Siebert, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for five (5) years.

You, Erich Heise, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for twenty (20) years.

You, Oswald Ulbricht, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for five (5) years.

You, Hans Niemann, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for five (5) years.

59 You, Felix Altenburg, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for eight (8) years.

You, Herbert Mueller, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for ten (10) years.

You, Siegfried Fuellkrug, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for twenty (20) years.

You, Walther Heissig, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for twenty (20) years.

You, August Stock, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for five (5) years.

You, Maria Muller, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for five (5) years.

Exhibit "H"—Extracts from FM 27-10 "Rules of Land Warfare"

133. Judicial prosecutions; notice to protecting power. At the opening of a judicial proceeding directed against a prisoner of war the detaining power shall advise the representative of the protecting power thereof as soon as possible, and always before the date set for the opening of the trial.

This advise shall contain the following information:

(a) Civil status and rank of prisoner;

(b) Place of sojourn or imprisonment;

(c) Statement of the charges and specifications, with notice of the legal provisions applicable.

If it is not possible to indicate in such notice the court which will pass upon the matter, the date of opening of the trial and the place where it will take place, this information must be furnished to the representative of the protecting power later, as soon as possible, and at all events, at least 3 weeks before the opening of the trial (G. P. W., Art. 60).

Exhibit "I"

ARMY ADVISORY GROUP, CHINA,
OFFICE OF THE CHIEF.

APO 909.

10 May 1947.

In the foregoing case of Lothar Eisentrager, alias Ludwig Ehrhardt, et al., the following action is taken:

As to Lothar Eisentrager, alias Ludwig Ehrhardt, the sentence of confinement at hard labor for life is approved and will be duly executed.

As to Ingward Rudloff, the sentence of confinement at hard labor for ten years is approved and will be duly executed.

As to Bodo Habenicht, the sentence of confinement at hard labor for ten years is approved and will be duly executed.

As to Hans Dethleffs, the sentence of confinement at hard labor for ten years is approved and will be duly executed.

As to Heinz Peerschke, the sentence of confinement at hard labor for five years is approved and will be duly executed.

As to Hans Mosberg, the sentence of confinement at hard labor for twenty years is approved and will be duly executed.

As to Johannes Rathje, the sentence of confinement at hard labor for fifteen years is approved and will be duly executed.

61 As to Walter Richter, the sentence of confinement at hard labor for ten years is approved and will be duly executed.

As to Hermann Jaeger, the sentence of confinement at hard labor for ten years is approved and will be duly executed.

As to Jesco von Puttkamer, the sentence of confinement at hard labor for thirty years is approved and will be duly executed.

As to Alfred Romain, the sentence of confinement at hard labor for thirty years is approved, but ten years thereof is remitted. As thus modified the sentence will be duly executed.

As to Franz Siebert, the sentence of confinement at hard labor for five years is approved and will be duly executed.

As to Erich Heise, the sentence of confinement at hard labor for twenty years is approved and will be duly executed.

As to Oswald Ulbricht, the sentence of confinement at hard labor for five years is approved and will be duly executed.

As to Hans Niemann, the sentence of confinement at hard labor for five years is approved and will be duly executed.

As to Felix Altenburg, the sentence of confinement at hard labor for eight years is approved and will be duly executed.

As to Herbert Mueller, the sentence of confinement at hard labor for ten years is approved and will be duly executed.

As to Siegfried Fuellkrug, the sentence of confinement at hard labor for twenty years is approved and will be duly executed.

As to Walther Heissig, the sentence of confinement at hard labor for twenty years is approved and will be duly executed.

As to August Stock, the sentence of confinement at hard labor for five years is approved, but three years thereof is

62 remitted. As thus modified the sentence will be duly executed.

As to Maria Mueller, the sentence of confinement at hard labor for five years is approved, but three years thereof is remitted. As thus modified the sentence will be duly executed.

Landsberg Prison, Landsberg, Germany, their present location, is designated as the temporary place of confinement until such time as a permanent place of confinement is designated by competent authority.

(S) JOHN P. LUCAS,
Major General, U. S. A., Chief.

A certified true copy:

PAUL L. OLNEY, *Captain, JAGD.*

Respondents' Exhibit One

HEADQUARTERS,
US FORCES, EUROPEAN THEATER,

APO 757.
AG 013.37 GAP-AGO. *11 July 1946.*

Subject: Designation of Prison for War Criminals

To: Commanding General, Third US Army Area.

1. The German penal institution at Landsberg, Germany, commonly known as the "Landsberg Prison", is hereby redesignated as the "War Criminal Prison" hereinafter referred to as the "prison".

2. All war criminals heretofore or hereinafter sentenced to imprisonment by specially appointed Military Government Courts for the trial of war crime cases conducted by the Deputy Theater Judge Advocate for War Crimes will be confined therein and all war criminals sentenced to death by such courts will be
63 confined therein pending final action by the reviewing or confirming authority, if any. Death sentences by such courts involving war criminals will be carried into execution in the prison.

3. The Commanding General, Third US Army will be responsible for the operation of the prison.

4. The employment of German personnel for the performance of routine functions in connection with the operation of the prison is permissible, however, American military or civilian personnel will be assigned to any positions necessary to assure adequate security.

5. All execution of death sentences will be carried out by and under the direction of American military personnel.

6. Security commensurate with the dangerous type of individuals confined in the prison will be maintained at all times.

7. Such part of the prison as is not required for the confinement of the individuals referred to in paragraph 2, above, may be utilized for the confinement of others sentenced to long terms of imprisonment insofar as such utilization does not endanger the general security of the prison.

By Command of General McNarney:

(S) GEORGE F. HERBERT,
Colonel, AGD,
Adjutant General.

Telephone: Frankfurt 2-3518.

DISTRIBUTION:
25—CG. 3rd US Army.
500—War Crimes Br JA Div.
5—TPM.
2—G–1.
2—G–3.
2—G–5.
5—OMG (US).

64 *Respondents' Exhibit Two*

War Department, Classified Message Center, Outgoing Classified Message

Paraphrase Not Required. Handle as Restricted Correspondence per Paras 44g and 53a, AR 380–5

Joint Chiefs of Staff.
Col C. R. Peck, Inf 77500.
27 December 1945.
Classification Cancelled.
Per SANACC Downgrading.
Proceedings on SWNCC 211/3.

(S) FRANK F. MITER.
Cd, GSC, 28 May 1948.

CG USFCT Shanghai China.
CG USFIBT New Delhi India.
CINCAFPAC Advance Tokyo Japan.
CINCAFPAC Command Manila PI.
CINCPOA Pearl Harbor Hawaii.
Number WARX 90285.

Book message to Wedemeyer and Terry for action; to MacArthur and Spruance for information from the Joint Chiefs of Staff.

The following directive approved by the State, War and Navy Departments is furnished for your guidance:

1. Primary responsibility for the apprehension, trial, and punishment of war criminals in India rests with the government of India, in Southeast Asia Command with SACSEA or such United Nations Governments as assume responsibility in succession to Southeast Asia Command, and in China with the Chinese Central Government. The United States may at its option elect to prosecute in any case where a war crime has been committed against an American National.

65 2. The Joint Chiefs of Staff desire that COMGENIB and COMGENCHINA do not establish courts for the trial of

war criminals without further authorization from the Joint Chiefs of Staff. It is desired, however, that both commanders furnish such information, evidence and other assistance as may be appropriate to assist the trial of war criminals by the authorities indicated in paragraph 1 above. Such assistance may include:

CM-OUT-90285 (Dec. 45).

a. The appointment of suitable officers of the United States Armed Forces to serve upon military courts appointed by other Allied Commanders where such appointments are requested and where offenses against United States Nationals are involved, and

b. Participation by United States Officers in the prosecution of cases involving offenses against United States Nationals.

c. Participation of United States Officers as observers at trials conducted by other Allied Governments in cases where offenses against United States Nationals are involved and which are not covered by the provisions of subparagraphs a and b above.

3. Report will be made to the Joint Chiefs of Staff on war criminals who have committed crimes against United States personnel, who in your opinion should be tried by a United States or International Tribunal.

4. Certain war criminals may be tried by International Tribunals in Japan as set forth in J.C.S. 1512 series already furnished addressees.

End.

ORIGINATOR: JC/S
INFORMATION: Adm Leahy; CG AAF; OPD; Adm Nimitz; C of S
CM-OUT-90285 (Dec. 45) DTG 272232z cc

court the writ must be directed to him. The Supreme Court said in Ex parte *McCardle*[35] that the jurisdictional act covers "every possible case of privation of liberty contrary to the National Constitution, treaties or laws". The statute must be so construed, lest it be invalid as constituting a suspension of the writ in violation of the constitutional provision.

There are expressions in opinions of courts to the effect that the writ runs not only to the jailer but to those who have power over him.[36] But we do not rest our decision upon those authorities. We rest it, as we have pointed out, directly upon the fundamental principles involved.

It is suggested that the foregoing result presents a practical problem of some difficulty. There are twenty-one of these appellants, and they are in Germany. To issue the writ would be to require that they be transported to this country for the hearing. But the Supreme Court made clear in *Walker* v. *Johnston*[37] and again in Ex parte *Quirin*[38] that this personal presence is not required as a first step. The District Court issued in this case a rule to show cause. Reply was made to the rule, and affidavits have been filed by the parties. Upon those papers, the controlling issues of law may be framed and presented in complete and satisfactory fashion. Upon the disposition of those issues, there may or may not remain other issues to be disposed of requiring the presence of the petitioners. But until that eventuality develops, the steps necessary to protect the rights of petitioners may be taken *seriatim*.

Upon its further consideration of the case, the District Court may find that one or more of respondents have no directive power, by line of authority, over the jailer of these appellants. That determination would depend upon statutes, executive orders, and War Department regulations. If such be found, the court will dismiss the action as to that or those respondents.

The judgment of the District Court dismissing the petition for lack of jurisdiction is reversed and the case remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

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[35] 6 Wall. 318, 325-326, 18 L. Ed. 816, 817 (1868).

[36] See Vaughan Williams, L. J., in Rex v. Crewe, *supra* note 14; Rivers v. Mitchell, 57 Iowa 193, 10 N. W. 626 (1881) (although this case related to the problem of custody of minor children); *Ex parte* Emerson, 107 Colo. 83, 108 P. 2d 866 (1940); People v. New York Juvenile Asylum, 57 App. Div. 383, 68 N. Y. S. 279 (1901); Sanders v. Allen, 69 App. D. C. 307, 100 F. 2d 717 (1938); *Ex parte* Fong Yim, 134 Fed. 938 (S. D. N. Y. 1905); Fielder v. Sadler, 193 Ga. 268, 18 S. E. 2d 486 (1942).

[37] 312 U. S. 275, 284, 85 L. Ed. 830, 61 S. Ct. 574 (1941).

[38] 317 U. S. 1, 24, 87 L. Ed. 3, 63 S. Ct. 1 (1942).

66 *Respondents' Exhibit Three*

War Department, Classified Message Center, Incoming Classified Message

PRIORITY—IVI

Paraphrase Not Required. Handle as Secret Correspondence per Paras 51 (i) and 60 (a) AR 380–5.

From: CG, USF China Theater, Shanghai, China.
To: War Department.
Nr: CFB–28889.

19 April 1946.

To War attention SERVJAC CFB 28889 from CONGEN CHINA:

Reurad 15th April 8441 note Walter Hutchinson Department Justice will depart in two weeks for Shanghai. Earlier departure desirable due to filing of petition for Habeas Corpus Writ in Chinese court. Papers not served on this headquarters nor will service be accepted.

New Subject.

15–20 German soldiers, civilians and consular officials have been arrested for violation of German surrender terms by continuing organized intelligence espionage and radio monitoring activities in China against United States for use of Japanese until V–J Day. Local political situation makes trial by United States military commission in China strongly advisable. Request authority of Joint Chiefs of Staff to appoint such court and punish guilty after trial in about 30 days. Refer radio this headquarters to WAR dated 17th April CFBX 28719. As part of repatriation sentences, if any, to be served in Germany. Understand German surrender terms to be as follows "In the event of the German high command or any of the forces under their control failing to act in accordance with this Act of Surrender, the supreme commander allied expeditionary forces and the Soviet high command will take
67 such punitive or other action as they deem appropriate" to forestall raising of technical defense that only SHAEF and Soviet command can punish request appropriate delegation to appointing authority this headquarters to try and punish for surrender violation. Further request true copies of surrender instrument in English and German certified by Adjutant General or Secretary of State for use in evidence. Understand that Germany * * *

End.

*Being serviced.

United States Court of Appeals for the District of Columbia Circuit. Filed Apr. 15, 1949, Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit
April Term, 1949

No. 10053

LOTHAR EISENTRAGER, alias LUDWIG EHRHARDT &c., et al., APPELLANTS

vs.

JAMES A. FORRESTAL, Secretary of Defense of the United States, et al., APPELLEES

Appeal from the United States District Court for the District of Columbia

Before: EDGERTON, PRETTYMAN and PROCTOR, JJ.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

Per Circuit Judge PRETTYMAN.

Dated April 15, 1949.

NOTE: CFBX 28719 is CM-IN-3634 (18 Apr. 46) CAD
ACTION: ASF
INFO: OPD (Col. Carter)
CAD
CM IN-4053 (19 Apr 46) DTG 190736Z rmw.

War Department, Classified Message Center, Incoming Classified Message

IVI

Priority

Supplementary Copy

Paraphrase Not Required. Handle as Secret Correspondence per Paras 51i and 60a, AR 380-5

From: Hq US Forces China Theater, Shanghai
To: War Department
Nr: CFB 28889

19 APRIL 1946.

To WAR attention SERVJAG CFB 28889 from COM GENCHINA:

Correct page 2-last line to read: Germany did not declare war on China. Please confirm.

End.

68 Note: Supplementary copy of CM-IN-4053 (19 Apr) ASF

ACTION: ASF
INFO: OPD (Col Carter)
CAD
CM-IN-4203 (20 Apr 46) DTG 190736Z wrb
Regraded Unclassified
Order Sec Army by TAG/8Y-306

Respondents' Exhibit Four.

War Department, Classified Message Center, Outgoing Classified Message

Paraphrase Not Required. Handle as Secret Correspondence per Paras 54 (i) and 60 (a). AR 380-5
Joint Chiefs of Staff.
Col. C. R. Peck, Inf.,
W. D. Extension 77500.
6 July 1946

84

United States Court of Appeals for the District of Columbia Circuit. Filed May 17, 1949, Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit

No. 10053

LOTHAR EISENTRAGER, Alias LUDWIG EHRHARDT, on his own behalf and as next friend of FRANZ SIEBERT, et al., APPELLANTS

v.

JAMES A. FORRESTAL, et al., APPELLEES

Petition for Rehearing

Now comes the Appellants and petition the Court for an order granting a rehearing in the above-entitled cause, for the following reasons:

1. The Appellant sued in the District Court for the District of Columbia on behalf of himself and twenty others similarly situated for writs of habeas corpus, testing the legality of their confinement by the United States Army in Landsberg, Germany, following upon trial and conviction by a United States Military Commission convened in Shanghai, China.

2. The District Court issued a rule to show cause; and, upon the return of the rule, dismissed the petition. The Court held, on the authority of *Ahrens* v. *Clark*, 335 U. S. 188 (1948) that it was without jurisdiction to entertain a petition of habeas corpus on behalf of persons confined outside the territorial limits of the District of Columbia. Having dismissed the writ on jurisdictional grounds, the District Court did not reach the question whether the petition was sufficient as a matter of law, i.e., whether it set forth facts sufficient to state a cause of action for the relief requested.

3. Upon appeal to this Court, the Court reversed the judgment of the District Court and remanded the cause to the District Court for further proceedings.

4. The opinion of the Court, dated April 15, 1949, deals only with the question of jurisdiction. It does not pass upon the sufficiency of the petition as a matter of law. It is submitted that this question was properly before this Court upon appeal from the dismissal of the petition, and that it was necessarily presented for adjudication once the Court determined that dismissal by the District Court could not be justified on jurisdictional grounds.

5. The fundamental question in this case is the sufficiency of the petition as a matter of law. There is no substantial question of fact

Classification Cancelled per
SANACC Downgrading Proceedings on SWNCC 211/7

(S) FRANK F. METER,
Col. GSC, 28 May 1948.

COMGENUSAFC, Shanghai, China
Number: WAR 93586

To Wedemeyer from the Joint Chiefs of Staff.

Your radio CFB-28889 refers.

Authority granted, provided the Chinese Government acquiesces, to appoint United States Military Commission in China for the trial of violation of the laws and customs of war and German soldiers, civilians, and consular officials, and such other persons as you may determine, who are charged with violation of German surrender terms; to proceed with the trials; and to approve and execute sentences, including the death penalty, subject to re-
69 view prescribed by the Commanding General of the U.S. Army Forces in China. You are further authorized to designate Germany as the place of confinement and execution of sentences of such convicted Germans as you may determine.

Office of Military Government for Germany (U.S.) concurs.

Note: CFB 28889 is CM-IN 4053 (19 April 46).
ORIGINATOR: JC/S
DISTRIBUTION: Admiral Leahy, CG AAF, D/PA, D/I D/SSP, D/PO, CAD, Admiral Nimitz, TAG, SERVAT, Mr. Petersen, Mr. Royall, C. of S.
CM-OUT-93586 (July 46) DTG 061703Z jjk

Respondents' Exhibit Five

War Department, Classified Message Center, Outgoing Classified Message

Classification cancelled per SANACC downgrading proceedings on SWNCC 211/7

(S) FRANK F. METER,
Col. GSC, 28 May 48.

Paraphrase Not Required. Handle as Secret Correspondence per Paras 51 (i) and 60 (a). AR 380-5.

Joint Chiefs of Staff.
W. D. Ext. 77500
Col. C. R. Peck, Inf.
9 July 1946

CO Nanking Headquarters Command, Nanking, China
Number: WAR 93751

herein. While the Government's reply would appear, at first blush, to raise two issues of fact, these issues, upon analysis, are clearly revealed to be issues of law. These issues are:

(a) Whether all of the respondents have directive power over the Commandant of Landsberg Prison. As the Court itself recognized in its opinion, determination of this issue "would depend upon statutes, executive orders, and War Department regulations", which are properly a matter for jurisdictional notice and judicial interpretation.

(b) Whether the prisoners were "civilians" or "soldiers." This issue is one of law, based upon all of the facts as to the status and activities of the prisoners, as set forth in the record of trial before the Military Commission. This record of trial is now before this Court as a part of the papers in the case.

6. No useful purpose would be served by sending this case back without disposing of the fundamental legal issues. The effect would be to subject the prisoners both to heavy financial burden and protracted delays. Under any circumstances, the case would have to come back to this Court, and it would return in virtually the same form and with the issues framed precisely as they now are.

7. The questions involved in the legality of the confinement have been fully briefed and argued. They are properly and necessarily before the Court upon this appeal from dismissal of the petition. Disposition of these issues by this Court would probably result in a final disposition of this case, since no substantial questions of fact are present. It is respectfully requested therefore, in the interests of expendition and economy, that the Court give consideration to and make disposition of these questions.

Respectfully submitted,

(S.) WALLACE M. COHEN,
Attorney for Appellants.

May 16, 1949.

Certificate of Service

I hereby certify that I have this day served the foregoing Petition for Rehearing upon counsel for all parties of record herein by mailing a copy thereof in a properly addressed envelope to each of the following:

Ross O'Donoghue, Esq., Assistant United States Attorney, Office of the United States Attorney, District of Columbia, Washington 1, D. C.

George Morris Fay, Esq., United States Attorney, District of Columbia, Washington 1, D. C.

To Commanding Officer Nanking Headquarters Command from the Joint Chiefs of Staff

Radio CFB-28889 refers.

70 Authority granted, provided the Chinese Government acquiesces, to appoint United States Military Commission in China for the trial for violation of the laws and customs of war of German soldiers, civilians, and consular officials, and such other persons as you may determine, who are charged with violation of the German surrender terms; to proceed with the trials; and to approve and execute sentences, including the death penalty subject to review prescribed by the Commanding Officer Nanking Headquarters Command. You are further authorized to designate Germany as the place of confinement and execution of sentences of such convicted Germans as you may determine.

Office of Military Government for Germany (U. S.) concurs.

The foregoing was transmitted to COMGENUSAFC Shanghai as WAR 93586 on 6 July 1946.

End.

Note: CFB 28889 is CM-In-4053 (19 April 46)

ORIGINATOR: JC/S
DISTRIBUTION: Admiral Leahy, CG AAF, D/I, CAD, SERVAT, D/PO (Colonel Carter), Admiral Nimitz, Mr. Petersen, C/S.

CM-OUT-93751 (July 46) DTG 091908Z jjf

Respondents' Exhibit Six

War Department, Classified Message Center, Outgoing Clear Message

P & O 250.4 (30 Nov 46)
WDGS P & O Opns Gp Pacific
WDGPO Lt Col Muir/mhh 5505

3 DECEMBER, 1946.

CG Army Advisory Group. Nanking China.
Number: WCL 34266

71 From WDGPO reference your 595 of 30 November 46.

Authority is hereby granted to review, approve and execute sentences of War Crime cases adjudged by military commission appointed by Commanding General, Nanking Headquarters Command. Authority is hereby granted to review prior cases

John D. Lane, Esq., Assistant United States Attorney, Office of the United States Attorney, District of Columbia, Washington 1, D. C.

(S.) WALLACE M. COHEN,
Attorney for Appellants.

Dated: May 16, 1949.

United States Court of Appeals for the District of Columbia Circuit, April Term, 1949

No. 10,053

LOTHAR EISENTRAGER, Alias LUDWIG EHRHARDT, on his own behalf and as next friend of Franz Siebert, et al., APPELLANTS,

vs.

JAMES A. FORRESTAL, Secretary of Defense of the United States, et al., APPELLEES

Before: Edgerton, Prettyman and Proctor, JJ.

Order

On consideration of appellants' petition for rehearing herein, It is Ordered by the Court that the petition be, and it is hereby, denied.

Per Curiam.

Dated June 6, 1949.

United States Court of Appeals for the District of Columbia Circuit. Filed Jun. 6, 1949. Joseph W. Stewart, Clerk.

In the United States Court of Appeals for the District of Columbia Circuit

No. 10053

LOTHAR EISENTRAGER, alias LUDWIG EHRHARDT, on his own behalf and as next friend of Franz Siebert, et al., APPELLANTS,

vs.

JAMES A. FORRESTAL, Secretary of Defense of the United States, et al., APPELLEES

Filed July 6, 1949. Joseph W. Stewart, Clerk.

Designation of Record

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for a writ

tried by General Courts Martial appointed by Commanding General, Nanking Headquarters Command.

End.

595 is Mc-In-50113 (2 Dec 46)

ORIGINATOR: P & O
DISTRIBUTION: AAF, CAD, P & A, TAG, USW, JAG, QMC

MC-OUT-34266 (Dec 46) DTG 041407Z mcs

Filed Jan. 24, 1949

Respondents' Exhibit 4A

Copy of Translation

From Dr. Wank Shih-chieh, Minister for Foreign Affairs
To: His Excellency, Dr. J. Leighten Stuart, American Ambassador to China

No. Tung-35/12489.

Date: November 26, 1946.

Excellency:

In connection with the arrest and extradition of war criminals by the United States Army authorities in China, I have the honor to refer to Your Excellency's formal note no. 354 of August 19, 1946, stating the proposition that, with the exception of cases relating to the extradition of non-enemy war criminals, which should be dealt with through normal diplomatic channels, it would appear that prior to the complete establishment of peace Allied justice could be more effectively served if the arrest and extradition of enemy war criminals were to continue within the jurisdiction of the relevant Chinese and American military authorities.

72 The United States Forces are in China basically as a part of the China war area command. They fought in league with the Chinese forces against the enemy. Also, their machinery for the trial of war criminals is one of affiliated organs of the Headquarters of the United States Forces. These make for special circumstances, and in view of the same, as well as with a view towards facilitating the expeditious disposal of war criminals prior to the complete establishment of peace, the Chinese Government has now revised as follows the MEASURES GOVERNING THE ARREST, EXTRADITION AND TRIAL OF WAR CRIMINALS BY THE UNITED STATES FORCES:

(1) As regards those war criminals who have committed crimes against Americans only the American forces in China (are to)

advise the local military or police organ (who will) make arrest on their behalf; the American forces may render assistance in the arrest; subsequent to the arrest, the Headquarters of the American forces will apply to the Ministry of National Defense for extradition.

(2) The American military tribunal for the trial of war criminals, during the time that the American forces are in China, (will/may) temporarily undertake the trial of war criminals within the territory of China.

(3) The arrest or extradition of non-enemy war criminals shall continue to be dealt with through normal diplomatic channels.

I have the honor to indite the above reply for Your Excellency's attention.

Accept, Excellency, the renewed assurances of my highest consideration.

(Stamped) WANG SHIH CHIEH.
(Sealed) *Ministry of Foreign Affairs.*

United States Court of Appeals for the District of Columbia Circuit. Filed Apr. 15, 1949. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10053

LOTHAR EISENTRAGER, Alias LUDWIG EHRHARDT, on his own behalf and as next friend of Franz Siebert, et al., APPELLANTS

v.

JAMES A. FORRESTAL, Secretary of Defense of the United States, et al., APPELLEES

Appeal from the United States District Court for the District of Columbia

Argued February 8, 1949. Decided April 15, 1949

Mr. A. Frank Reel of the Bar of the Supreme Judicial Court of Massachusetts, *pro hac vice*, by special leave of the Court, with whom *Mr. Wallace M. Cohen* was on the brief, for appellant.

Mr. Ross O'Donoghue, Assistant United States Attorney, with whom *Mr. George Morris Fay*, United States Attorney, and *Mr. John D. Lane*, Assistant United States Attorney, were on the brief, for appellees.

Before EDGERTON, PRETTYMAN and PROCTOR, *JJ.*

PRETTYMAN, *J.*:

Appellant is a German national confined in Landsberg Prison, Germany, in the custody of the United States Army. He was a petitioner on behalf of himself and twenty others in the same situation,[1] for writs of habeas corpus in the District Court of the United States for the District of Columbia. Appellees are the Secretary of Defense, the Secretary of the Army, the Chief of Staff of the Army, and the Joint Chiefs of Staff of the United States. They were respondents in the action below. The District Court dismissed the action for want of jurisdiction, upon the authority of *Ahrens* v. *Clark*.[2] The statute (Rev. Stat. 752, 28 U. S. C. A. 452 (now 28 U. S. C. A. § 2241)) is that "the several judges . . . of the district

[1] Collins v. Traeger, 27 F. 2d 842 (C. C. A. 9th 1928). Throughout this opinion we shall refer to all these persons as appellants.

[2] 335 U. S. 188, 92 L. Ed. —, 68 S. Ct. 1443 (1948).

of certiorari in the above-entitled cause, and include therein the following.

1. Joint Appendix, including Joint Appendix of Exhibits
2. Opinion.
3. Judgment.
4. Petition for Rehearing.
5. Order denying rehearing.
6. This designation.
7. Clerk's certificate.

PHILIP B. PERLMAN,
Solicitor General,
Counsel for Appellees.

I hereby certify that I have this day served a copy of the foregoing Designation of Record on the following parties by mailing copies to them at their business addresses:

A. Frank Reel, 20 Pemberton Square, Boston, Mass.
Wallace M. Cohen, 1822 Jefferson Place, N. W., Washington, D. C.

PHILIP B. PERLMAN,
Solicitor General.

Dated: July 5, 1949.

United States Court of Appeals for the District of Columbia Circuit

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages, numbered 1 to 87, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties and the proceedings of the said Court of Appeals, as designated by counsel in the case of: Lothar Eisentrager, alias Ludwig Ehrhardt, on his own behalf and as next friend of Franz Siebert, et al., Appellants, v. James A. Forrestal, Secretary of Defense of the United States, et al., Appellees, No. 10,053, April Term, 1949, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this first day of August, A. D. 1949.

[SEAL.]

(S.) JOSEPH W. STEWART,
Clerk of the United States Court of Appeals for the District of Columbia Circuit.

88

In the Supreme Court of the United States, October Term, 1949

No. —

JAMES V. FORRESTAL, Secretary of Defense of the United States, et al., PETITIONERS,

vs.

LOTHAR EISENTRAGER, alias LUDWIG EHRHARDT, on his own behalf and as next friend of Franz Siebert, et al., DEFENDANTS

Stipulation

Subject to this Court's approval, it is hereby stipulated and agreed, by and between counsel for the respective parties hereto, that for the purpose of the petition for writ of certiorari the printed record may consist of the following:

1. Joint Appendix, including Joint Appendix of Exhibits.

2. The proceedings had before the United States Court of Appeals for the District of Columbia Circuit as set forth in the Designation of Record filed by the Petitioners.

It is further stipulated and agreed that petitioners will cause the Clerk of the United States Court of Appeals for the District of Columbia Circuit to certify and file with the Clerk of the Supreme Court of the United States the entire transcript of record on appeal in the United States Court of Appeals for the District of Columbia Circuit; and that in the event the petition for writ of certiorari is granted, the printed record shall consist of the proceedings in the court below and such portions of the complete transcript of record on appeal in that court as the parties may designate.

It is further stipulated and agreed that any of the parties may refer in their briefs to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed.

PHILIP B. PERLMAN,
Solicitor General,
Counsel for Petitioners.

Dated: July 5, 1949.

WALLACE M. COHEN,
Counsel for Respondents.

Dated: July 7, 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE 1949 848387

courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus. . . ."

Prior to May 8, 1945, appellants were civilian employees of the German government in China.[3] On that date Germany surrendered. Thereafter, and until August 15, 1945, the cities in which appellants were located were under control of the military Forces of the Japanese Empire, which continued to wage war against the United States until that date. In August, 1946, appellants were served with charges of violation of the laws of war, in that they had engaged in military activity against the United States after the surrender of Germany. They were tried and convicted by a military commission.

This commission was a United States military commission, constituted by the Commanding General, Nanking, Headquarters Command, by delegation from the Commanding General, United States Forces, China Theater, pursuant to authority specifically granted by the Joint Chiefs of Staff of the United States. No question of international action or authority is presented.[4]

The immediate jailer of appellants is the Commandant of Landsberg Prison, an American Army officer who derives his authority from the Commanding General, Third United States Army, and the Commanding General, United States Forces, European Theater (now designated Commanding General, European Command). The petition alleges that the Commandant of the Prison "is subject to the direction of the respondents". The reply of respondents to the rule to show cause says that the Commandant is subject to the supervision of the Commanding Generals of the United States Army in Europe "and not to that of respondents." This conflict in the pleadings seems merely to relate to the immediate physical custody of appellants, and not to concern the supervisory directive power of the Joint Chiefs of Staff or the Chief of Staff of the United States Army over the Commanding Generals. Such is the purport of the brief of respondents. For purposes of this appeal, we assume this to be the situation.[5] Appellants alleged and respondents admitted that appellants are confined in the custody of the United States Army.

Appellants alleged in their petition that their confinement is in violation of Articles I and III of the Constitution of the United States, of the Fifth Amendment thereto, and of other provisions of the Constitution and laws of the United States and of the Geneva

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[3] Whether they were employed in civilian agencies or by the armed forces is a disputed fact.

[4] *Cf.* Hirota v. MacArthur, 17 U. S. L. WEEK 4076 (U. S. Dec. 20, 1948).

[5] As to the Chief of Staff, see 32 STAT. 831 (1903), as amended, 10 U. S. C. A. § 33a.

Convention of July 27, 1929. They alleged that the military commission was without jurisdiction to try them or the offenses with which they were charged or in the manner in which the proceeding was had.

The question is whether the District Court has power to entertain appellants' petition. This is the question reserved in *Ahrens* v. *Clark*[6] and in Ex parte *Endo*.[7] In fact the question was not involved in the decision of those cases.

We must answer these questions: (1) Are these petitioners entitled to the writ[8] as a matter of substantive right? (2) If they are so entitled, could an omission in a federal jurisdictional statute deprive them of the privilege? (3) If they are entitled to the writ and cannot be deprived of the privilege, in what court does their petition lie, they and their immediate jailer being outside the territorial jurisdiction of any district court? The answers stem directly from fundamentals. They cannot be found by casual reference to statutes or cases.

We shall not elaborate our discussion but merely state the principles from which we derive our conclusion.

1. We think that any person who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confinement is in violation of a prohibition of the Constitution, has a right to the writ. This conclusion necessarily follows from the following premises. *First*. The Fifth Amendment, by its terms, applies to "any person".[9]

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[6] *Supra* at 335 U. S. 192, n. 4.

[7] 323 U. S. 283, 305, 89 L. Ed. 243, 65 S. Ct. 208 (1944).

[8] We are dealing with the writ of habeas corpus *ad subjiciendum* only.

[9] Mr. Justice Murphy, dissenting in In Re *Yamashita*, 327 U. S. 1, 26, 90 L. Ed. 499, 66 S. Ct. 340 (1946), strikingly phrased the matter thus: "The Fifth Amendment guarantee of due process of law applies to 'any person' who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy

Supreme Court of the United States

Order allowing certiorari

Filed November 14, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas took no part in the consideration or decision of this application.

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